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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

OWEN D. OKSANEN, M.D.,

Petitioner,

v.

PAGE MEMORIAL HOSPITAL; J.R. HOSLINGER, M.D.; FANG S. HORNG, M.D.; JAMES G. DALE, M.D.; ROMULO ANCHETA, M.D.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether a hospital and the members of its medical staff are capable as a matter of law of contracting, combining or conspiring in restraint of trade in violation of the Sherman Act, 15 U.S.C. §1, *et seq*.

Whether summary judgment was properly granted when the Plaintiff below was denied the opportunity to conduct adequate and sufficient discovery prior to the imposition of an order staying discovery.

PARTIES

The parties to the proceedings in the court below were Owen D. Oksanan, M.D., Plaintiff and Page Memorial Hospital, J. R. Holsinger, M.D., Romulo Ancheta, M.D., Fang S. Horng, M.D. and James G. Dale, M.D., Defendants.

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IN THE
SUPREME COURT OF THE UNITED STATES

OWEN D. OKSANEN, M.D.,
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PAGE MEMORIAL HOSPITAL, et al.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Owen D. Oksanen, M.D., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, sitting en banc, entered in this proceeding on September 4, 1991.

OPINIONS BELOW

The United States District Court for the Western District of Virginia granted summary judgment against the Petitioner, Owen D. Oksanen, M.D. ("Oksanen"), the

Plaintiff below, on June 16, 1989. (Opinion in Appendix). A three judge panel of the Fourth Circuit Court of Appeals reversed the District Court's dismissal of Dr. Oksanen's claims and remanded to afford Oksanen an opportunity for discovery. Oksanen v. Page Memorial Hosp. et al., 912 F.2d 73 (4th Cir. 1990) (Opinion in Appendix). By order dated September 30, 1990, the Fourth Circuit granted the petition to rehear the case en banc of the Respondents, Defendants below. The Court sitting en banc addressed Oksanen's federal antitrust claim as well as his State claims in its decision. Oksanen v. Page Memorial Hospital, et al, 945 F.2d 696 (4th Circ. en banc 1991), (Official Opinion No. 89-1768 in Appendix). The Court reversed the decision of the three judge panel and affirmed the decision of the District

Court. Three judges joined in a dissenting opinion written by Judge Murnaghan.

JURISDICTIONAL STATEMENT

The Court of Appeals entered its judgment after rehearing en banc on September 4, 1991. Jurisdiction of this Court is proper under 28 U.S.C. Section 1254.

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. Section 1 et seq., provides that

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

15 U.S.C. Section 1.

STATEMENT OF THE CASE

The Petitioner, Dr. Owen D. Oksanen, M.D., currently a resident of the state of Florida, was a physician duly licensed to practice medicine in the Commonwealth of Virginia. From July 1978 until September 1984 he practiced family medicine in Page County and Luray, Virginia.

The individual Respondents, J. R. Holsinger, M.D., Romulo Ancheta, M.D., Fang S. Horng, M.D. and James G. Dale, M.D. (the "Doctors"), were all physicians licensed to practice medicine by the Commonwealth of Virginia and, at all relevant times, practiced medicine in or around Page County and Luray, Virginia. The Doctors also practiced in and operated from Page Memorial Hospital (the "Hospital"). While the practice of each of the Doctors was generalized to some extent, Holsinger was primarily a general

practitioner, Ancheta and Horng were primarily surgeons and Dale was primarily a general practitioner with an emphasis on cardiology. The Doctors were also members of the Hospital's Medical Staff (the "Medical Staff"). The Hospital is a community hospital and is the only hospital in Page County and Luray, Virginia. The populations of Page County and Luray Virginia are approximately 18,000 and 3,500 respectively.

After finishing his residency at the University of Virginia Hospital in 1978, Oksanen moved to Page County, Virginia, to practice medicine. Upon arriving, Oksanen was offered a position in Holsinger's office which he declined in order to open an office as a sole practitioner. After a probationary period of one year, Oksanen was given full medical staff privileges at the Hospital. Holsinger attempted to

prevent Oksanen from reaching permanent status, but was opposed by Horng and Ancheta.

Beginning in 1978, when Oksanen declined to practice in association with Holsinger, and continuing through 1984, Oksanen contends that the Respondents attempted to curtail or eliminate his medical privileges at the Hospital without justification. As Oksanen continued to develop his practice, he became increasingly concerned over the quality of care his patients received at the Hospital. Consequently, he began to refer many of his patients to other hospitals, primarily the University of Virginia Medical Center. In 1983, friction also developed between the nursing staff at the Hospital and the Medical Staff in general. Oksanen's position was supported by a sizeable number of citizens in the

community who opposed those in control of the Hospital. This group succeeded in replacing one-third of the Hospital's board, including Holsinger, and there was a substantial threat that they would succeed in replacing another third in the next year.

At a July 12, 1983 meeting, the Board voted to request that the Medical Staff take corrective action against Oksanen in particular. The Executive Committee of the Medical Staff, composed of the Doctors, met on August 4, 5 and 11 to discuss the Board's request. At the August 11 meeting, Horng moved to revoke Oksanen's Medical Staff privileges. The motion carried by a vote of 3 to 1 with Oksanen casting the opposing vote. Oksanen noted an appeal to the Joint Conference Committee of the Hospital which met to review the Medical Staff's

decision. The Joint Conference Committee, of which Ancheta was a member, conducted hearings and received conflicting testimony concerning Oksanen. On October 6, 1983, the Executive Committee, after reviewing the proceedings before the Joint Conference Committee, voted to recommend to the Joint Conference Committee that Oksanen's staff privileges be revoked. Instead, the Board ultimately voted to suspend Oksanen's privileges through December 31, 1983, to be followed by a one year probationary period.

After Oksanen's return to the Medical Staff in early 1984, he offered to work cooperatively with the other members of the Medical Staff. His relations with the Doctors and the Hospital nonetheless continued to be strained. On May 4, 1984, the Board again voted to request the Medical Staff to take corrective action

against Oksanen. On June 14, 1984, the Joint Conference Committee convened a hearing to consider additional charges against him. On June 22, 1984, the Executive Committee of the Medical Staff voted to recommend to the Board that Oksanen's privileges be revoked. On June 27, 1984, Oksanen resigned from the Medical Staff.

As a result of the actions of the Doctors and the Hospital, professional disciplinary action was initiated against the Petitioner by the Virginia State Board of Medicine in September, 1984 and concluded in December, 1986 with the issuance of a consent order. Thereafter, disciplinary proceedings were also initiated in the states of Maryland and Florida. The Virginia proceedings were concluded with a reprimand being issued to Oksanen by a consent finding without a

decision on the merits. His license to practice medicine in Virginia has neither been suspended nor terminated. Proceedings held on the merits in Maryland and Florida resulted in decisions favorable to Oksanen.

Oksanen filed his Complaint in the United States District Court for the Western District of Virginia on June 13, 1988 against the Hospital and the Doctors. Federal Jurisdiction was pursuant to 28 U.S.C. § 1337 and its pendant jurisdiction, also by diversity of citizenship pursuant to 28 U.S.C. § 1332. The Complaint set forth antitrust claims under Sections 1 and 2 of the Sherman Act, under the Virginia Antitrust Act, and asserted pendant state claims for conspiracy, tortious interference with a contractual relationship and defamation. Jurisdiction of the District Court was

invoked pursuant to 28 U.S.C. Sections 1332 and 1337.

The Defendants filed motions to dismiss and/or for summary judgment, which the District Court treated as motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Prior to the hearing on the motions, the Petitioner had responded to certain discovery requests propounded by two of the individual Respondents. Oksanen had also served his own discovery requests on the Respondents to which no response had been received as of the date of the District Court's decision on the motions for summary judgment, the District Court having stayed all discovery by order of November 10, 1988. The order staying discovery remained in effect and the Oksanen was unable to obtain answers to any of his discovery requests. No

deposition or other testimony was taken at the hearing. By order entered June 16, 1989, the District Court granted all motions for summary judgment and dismissed the Plaintiff's action.

The Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. The case was heard by a three judge panel of that Court which reversed the District Court's dismissal and remanded to afford Oksanen an opportunity for discovery. Oksanen, 912 F.2d 73, (Opinion in Appendix). On petition from the Respondents, the Fourth Circuit granted a rehearing en banc by order dated Setember 30, 1990.

In reversing its three judge panel, the Fourth Circuit determined that the Hospital and the Medical Staff are indistinct from each other because the Medical Staff acts as an agent of the

Hospital during the peer review process. En banc opinion at 8. The Court went on the determine that the Hospital and its Medical Staff "lacked the capacity to conspire during the peer review process" under the principle of intercorporate immunity. Id. at 14. The Court also determined that Oksanen had failed to meet his burden on the Respondents' motions for summary judgment of establishing that the medical staff conspired among itself. Id. at 14-17. The Court determined that "discovery was well tailored by the District Court to address the pivotal issue in a denial of privileges case" and determined that Oksanen received adequate discovery. Id. at 17. The en banc decision results in this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With the Decisions Of Other Courts of Appeals Concerning Whether A Hospital And Its Medical Staff Members May Conspire.

The decision below exemplifies a conflict among federal Courts of Appeals concerning whether a hospital and the members of its medical staff may conspire together and thus be subject to the penalties of Section 1 of the Sherman Act. Accordingly, review is necessary to resolve this conflict among courts. Shapiro v. United States, 235 U.S. 412 (1914).

Contrary to the decision below, the 11th and 9th Circuits have determined that peer review decisions of a hospital and its medical staff members may be the subject of penalties under Section 1 of the Sherman Act. This is the position taken by the initial three judge panel in

the Fourth Circuit. In Bolt v. Halifax Hosp. Medical Center, 891 F.2d 810 (11th Cir. 1990), cert. denied, 110 S. Ct. 1960 (1990), the bylaws of three hospitals provided that several different committees each composed of medical staff members would consider whether a physician would be granted staff privileges. Recommendations from the committees were considered by the governing board of the hospital which made the final decision regarding privileges. Bolt, 891 at F.2d at 814. Bolt alleged a conspiracy between each hospital at which his privileges were denied or revoked and the members of their medical staffs who participated in the peer reviews. Id. at 816. When focusing on the issue of whether a hospital and its medical staff are legally capable of conspiring with each other, the Eleventh court distinguished the reasoning

supporting the rule that a corporation cannot conspire with its officers and directors from the case before it. Id. at 819. That rule, the court determined, was formulated because whenever an officer or director of a corporation performs an act in the course of his agency, that act will also be deemed an act of the corporation, and a conspiracy could theoretically occur. Id. A corporation, although a legally distinct entity, can only act through its officers and directors, who, unlike the actual corporation, are individually capable of performing any necessary action. Unlike a corporation, however, a hospital is capable of acting separately from the members of its medical staff in many instances. A hospital is a legally separate entity from its medical staff in that it does not require the assistance of the members of its medical

staff in order to operate as a going concern. The members of the medical staff do not act as directors or officers of a hospital/corporation. As the Bolt court aptly pointed out, the decision that the hospital and its medical staff are legally capable of conspiring with each other "does not mean, however, that every action taken by the committees and hospitals satisfies the contract, combination, or conspiracy requirement of Section 1 of the Sherman Act". Id. Rather, the plaintiff in a particular case must prove the actual existence of a conspiracy by either direct or circumstantial evidence. Id.

An allegation of a conspiracy between anesthesiologists and a local hospital was involved in Oltz v. St. Peter Community Hosp., 861 F.2d at 1440 (9th Cir. 1988). In Oltz, the Ninth Circuit found that while the anesthesiologists may have been

the hospital's agents for some purposes, "their interests were not as wed as the ties between a corporation and its officers or employees". Id. at 1450. A corporation acts only through its officers, directors and employees. As long as they are acting within the scope of their duties they are the same and have no separate legal existence, except as agents of the corporation. A medical staff, on the other hand, relates to the hospital only in the context of independent contractors and may, in fact, use the hospital for their own purposes and not necessarily those designed to advance the interests of the hospital.

In deciding that a hospital and its medical staff cannot conspire in restraint of trade, the Fourth Circuit aligned itself with the Sixth Circuit, Nurse Midwifery Assoc. v. Hibbett, 918 F.2d 605

(6th Cir. 1990), and the Third Circuit, Nanavati v. Burdette Tomlin Memorial Hosp., 857 F.2d 96 (3d Cir. 1988). Only this Court can effectively resolve the source of conflict among the Circuit Courts of Appeals. This conflict provides sufficient grounds for reviewing the decision below.

II. The Actions Of The Trial Court Ended Oksanen's Case At the Summary Judgment Stage, Without Allowing Him An Adequate Opportunity For Discovery.

In affirming the decision of the District Court, the Fourth Circuit determined that Oksanen was afforded adequate discovery on the key issues in his suit and that "the case was ripe for summary judgment." Oksanen 945 F.2d at 17. However, Oksanen had discovery requests outstanding to all Respondents which were due but which remained

unanswered at the time of the summary judgment hearing and at the time summary judgment was granted. These requests had not been answered because the District Court imposed a stay on discovery prior to its decision to grant summary judgment. As a result, Oksanen was allowed virtually no discovery while the Respondents' discovery requests were answered by Oksanen prior to the stay. As a consequence Oksanen was forced to deal with the Defendants' motions to dismiss at a preliminary stage, prior the completion of adequate discovery, as though they were motions for summary judgment made at the conclusion of the discovery phase of the case. Oksanen was thereby faced with a massive albeit selective submission of documents by the Defendants with no opportunity to probe and test or supplement those submissions with the

customary tools of discovery. Under such circumstances, the party who is not in control of the documents and other sources of evidence is left naked and at the mercy of the party who has control of those essential resources. This is especially true in antitrust cases where the evidence of wrongdoing must largely come from the records of the defendants. This is hardly the basis on which the modern rules of discovery are anchored. As the minority in the en banc hearing at the Fourth Circuit stated by way of Judge Murnaghan's dissenting opinion:

> Like the district court, the majority bases its disposition on the lack of evidence presented by Oksanen of conspiracy among the medical staff. I would be surprised indeed if the medical staff would have discussed, at any meeting with records available to Oksanen, a plan to conspire against him. Thus, Oksanen, without access to the files or minds of the defendants,

> obviously could not obtain such evidence in the absence of discovery.

Oksanen, 945 F.2d at 24-25.

This Court's position has also traditionally been that "in antitrust cases where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." Hospital Building Co. v. Trustees of Rex Hosp., 425 U.S. 738, 746 (1976) (quoting Poller v. Columbia Broadcasting, 368 U.S. 464, 473 (1962)). Because summary judgment was granted by the District Court and upheld by the Fourth Circuit prior to allowing Oksanen sufficient opportunity to conduct discovery, the Court should grant a review.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issued to review the opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

OWEN D. OKSANEN, M.D., *Plaintiff-Appellant,* v. PAGE MEMORIAL HOSPITAL; J.R. HOLSINGER, M.D.; ROMULO ANCHETA, M.D.; FANG S. HORNG, M.D.; JAMES G. DALE, M.D., *Defendants-Appellees,* AMERICAN HOSPITAL ASSOCIATION; THE VIRGINIA HOSPITAL ASSOCIATION, *Amici Curiae.*	No. 89-1768

Appeal from the United States District Court
for the Western District of Virginia, at Harrisonburg.
James H. Michael, Jr., District Judge.
(CA-88-166-H)

Argued: February 5, 1991

Decided: September 4, 1991

Before ERVIN, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, WILKINSON, WILKINS, and NIEMEYER, Circuit Judges, and BUTZNER, Senior Circuit Judge, sittin in banc.

Affirmed by published opinion, Judge Wilkinson wrote the majority opinion, in which Judge Russell, Jude [sic] Widener, Judge Hall, Judge Sprouse, Judge Wilkins, and Judge Niemeyer joined, Judge Murnaghan wrote a dissenting opinion, in which Chief Judge Ervin, Judge Phillips, and Senior Judge Butzner joined.

[p. 2] **COUNSEL**

ARGUED: Edward B. Lowry, MICHIE, HAMLETT, LOWRY, RASMUSSEN & TWEEL, P.C., Charlottesville, Virginia, for Appellant. Judith Bowles Henry, CREWS & HANCOCK, Richmond, Virginia, for Appellees. **ON BRIEF:** Robert W. Jackson, MICHIE, HAMLETT, LOWRY, RASMUSSEN & TWEEL, P.C., Charlottesville, Virginia; Sheldon Braiterman, Baltimore, Maryland, for Appellant. Lynn Fleming, Karen L. Gould, CREWS & HANCOCK, Richmond, Virginia, for Appellee Dale; Stephen L. Altman, Vicki J. Hunt, MONTEDONICO & MASON, Fairfax, Virginia, for Appellee Horng; Norman F. Slenker, SLENKER, BRANDT, JENNINGS & JOHNSTON, Fairfax, Virginia, for Appellee Holsinger; Edward M. Burns, II, POINDEXTER, BURNS & MARKS, Waynesboro, Virginia, for Appellee Holsinger; Phillip C. Stone, Gregory T. St. Ours, WHARTON, ALDHIZER & WEAVER, Harrisonburg, Virginia, for Appellee Page Memorial Hospital; Mary S. Meade, MEADE & ASSOCIATES, P.C., Vienna, Virginia, for Appellee Ancheta. Frederic J. Entine, Jeffrey M. Teske, Tracey L. Fletcher, AMERICAN HOSPITAL ASSOCIATION, Chicago, Illinois; Heman A. Marshall, III, WOODS, ROGERS & HAZLEGROVE, Roanoke, Virginia, for Amicus Curiae American Hospital Association; John J. Miles, Philip A. Proger, JONES, DAY REAVIS & POGUE,

Washington, D.C., for Amicus Curiae Virginia Hospital Association.

OPINION

WILKINSON, Circuit Judge:

Appellant Dr. Owen D. Oksanen contends that the Sherman Antitrust Act was violated when the medical staff of Page Memorial Hospital allegedly conspired amongst itself and with the hospital's Board of Trustees to revoke Oksanen's staff privileges. Whether such conspiracies are cognizable under federal antitrust law has significant implications for the nation's health care system because the peer review process that Oksanen challenges has become an important element of hospital governance.

[p. 3] In our view, the Board of Trustees and the medical staff of Page Memorial comprised a single entity during the peer review process. Because an entity cannot conspire with itself, the Board and the staff lacked the capacity to conspire. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). While the members of a medical staff may have the capacity to conspire among themselves, such a conspiracy did not occur in this case. We likewise affirm the district court's dismissal of Oksanen's other claims and its refusal to cloak in federal antitrust law what is in essence a workplace dispute.

I.

Upon completing a residency program in 1978, Dr. Owen D. Oksanen began practicing family medicine in Luray, Virginia. Luray is located in Page County, a county of approximately 18,000 residents. In 1979, Oksanen received full medical staff privileges at the sole hospital in Page County, the fifty-four bed Page Memorial Hospital.

This hospital, like many others, has an organizational structure with three components. First, the Board of Trustees operates as the hospital's governing body with final decisionmaking authority on issues affecting the hospital. Second, day to day management of the hospital is vested in a hospital administrator. In this case, John S. Berry was the administrator responsible for supervising the hospital's staff of nurses, laboratory personnel, and other providers of services. Third, the physicians at the hospital are organized as a medical staff. Dr. Oksanen became a member of the staff by virtue of being granted staff privileges. Other members of the medical staff included Dr. Ancheta who primarily practiced general surgery, Dr. Horng who was also a surgeon, Dr. Holsinger a family practitioner, and Dr. Dale who was admitted to the staff in August of 1983 and practiced as an internist.

Page Memorial itself does not directly employ the physicians on the medical staff, but rather provides a facility for physicians to treat those of their patients who need hospital care. The hospital encourages physicians to seek staff privileges by providing staff members with office space and allowances for expenses. As part of the medical staff's relationship with the hospital, it engages

in a process known [p. 4] as peer review. During peer review, the members of the medical staff make recommendations to the Board on whether physicians meet the standards for practicing medicine at the hospital in the first instance and on whether a physician will be able to continue practicing once he or she has been accorded staff privileges.

Almost immediately after the medical staff granted privileges to Oksanen the complaints about his conduct began. For example, in October 1979, administrator Berry wrote to Oksanen questioning his attitude toward the use of laboratory facilities and the treatment of laboratory personnel. The chronicle of complaints pertaining to Oksanen's abusive attitude mounted over time. Oksanen reportedly addressed or referred to hospital employees and third party professional reviewers with profanity. In another incident, this time in the emergency room, he termed the mother of a young patient a "red neck from Stanley." Many of Oksanen's outbursts were made publicly and disrupted hospital operations. One nurse who worked with him commented that he "has a volatile personality and you just don't know when it's going to erupt."

Oksanen contends that the friction which developed at the hospital could not be attributed to him alone. He responds that his actions simply reflected his concern with the quality of patient care at the hospital. For instance, he states that he questioned whether Drs. Horng and Ancheta recognized the appropriate limitations on their surgical abilities. As a result, he began referring his patients to other hospitals where he contended they would receive a better quality of care. Oksanen also

claims that his poor relationship with Dr. Holsinger stemmed from his earlier refusal to accept a position in Dr. Holsinger's office.

Unfortunately, relations between Oksanen and other members of the hospital and medical staffs only worsened over time. In May of 1983, Oksanen publicly reprimanded a nurse and her supervisor for allegedly providing poor care to his patients. When the nurses attempted to respond, Oksanen refused to discuss the matter, threw down his charts, and left the area. Oksanen's actions spurred hospital administrator Berry to request that the medical staff, in accordance with Medical Staff Bylaws, investigate the incident. The medical staff declined, however, to take disciplinary action against Oksanen.

[p. 5] Oksanen's involvement in another incident, however, did motivate the hospital to take action against him. In response to a letter to all physicians from the President of the Board seeking a harmonious working environment, Oksanen wrote the Board that its letter was "demeaning [and] insulting." Oksanen further indicated that he would not cooperate with the Board's efforts unless the Board retracted its letter and a Trustee personally retrieved the letter from his office. The board of Trustees discussed Oksanen's response at its July 12, 1983 meeting. Dr. Holsinger, the only physician who also served on the Board, was absent from the meeting Dr. Ancheta and administrator Berry both told the Board that they believed disciplinary actions against Oksanen were appropriate. The Board voted unanimously to request that the medical staff take corrective action against Oksanen. The Board, based on the staff's earlier refusal to

take action against Oksanen, warned that if action was not taken against Oksanen, it would be forced to evaluate more thoroughly his hospital privileges during the annual credentialing process.

In response, the medical staff voted to revoke Oksanen's staff privileges. Oksanen then appealed this decision to a joint conference committee comprised of Dr. Ancheta and two members of the Board. This committee heard testimony from sixteen witnesses, including Oksanen. Some witnesses testified to Oksanen's competence, while other witnesses testified to the corrosive impact of Oksanen's behavior on staff morale and relations. For instance, the committee heard testimony that Dr. Oksanen initially rebuffed a suggestion by administrator Berry that they meet to discuss a concern about patient care raised by Oksanen. Then one night around 10:30 p.m. Oksanen called Berry at home demanding that they meet later that night to discuss the concern and stating that he would call back every twenty minutes until a meeting was arranged. Eventually Oksanen agreed to meet with Berry, two nursing supervisors, and the Chief of Staff the next morning at the hospital, but Oksanen failed to appear for the meeting even though he apparently was in the hospital and had been paged. After considering the body of evidence relating to Oksanen, the joint conference committee recommended to the Board that, at a minimum, his privileges be suspended.

The Board then in October of 1983 held a meeting at which Oksanen and his attorney argued against the committee's recommen- [p. 6] dation. The Board voted 9-2, with Dr. Holsinger abstaining, to suspend Oksanen's privileges for a two-month period, to be followed by a

grant of privileges on a one-year probationary basis. The Board also stated that members of the medical and hospital staffs would be expected to cooperate with Oksanen during his probationary period.

Around the time of the suspension, public interest in Oksanen's relationship with the hospital began to increase, stimulated in part by Oksanen's own actions. A few days after the suspension, Oksanen held a news conference at which he appealed for community support in his confrontation with the hospital. During the conference, he also questioned the competence of one surgeon practicing at Page Memorial and expressed his belief that Dr. Holsinger's alleged control over the local nursing home was preventing him (Oksanen) from admitting patients to the home. A group of Oksanen's patients formed the nucleus of a committee that campaigned to elect their representatives to the Hospital's Board of Trustees. Four representatives were elected to the Board, including a replacement for Dr. Holsinger.

Oksanen made some conciliatory gestures toward the medical staff when he began his probationary period in January, 1984. It appears, however, that relations between the medical staff and Oksanen had been irreparably harmed. During the probationary period, Oksanen and the medical staff traded charges that they were not living up to the conditions imposed on them by the Board. the hospital administration continued to receive further complaints relating to Oksanen's disruptive behavior. On May 8, 1984, the Board of Trustees again requested the medical staff to take corrective actions against Oksanen. This set in motion the same administrative process that previously had evaluated Oksanen's conduct. The joint

conference committee heard, among other things, testimony expressing concern that Oksanen's delay in providing care threatened the welfare of a mother and her newborn child. Hospital and medical staff members also complained that Oksanen's failures to communicate with them and to fulfill his duties to provide emergency room coverage jeopardized patient care. The medical staff eventually recommended that Oksanen's privileges be permanently revoked. Before the Board made a final decision, Oksanen resigned from the staff on June 27, 1984.

After his resignation, Oksanen remained on the staff at nearby Shenandoah Memorial Hospital and he continued to practice medicine [p. 7] in Virginia through the end of 1984. In September, 1984 the Virginia Board of Medicine initiated disciplinary proceedings against Oksanen. These proceedings concluded in a consent order reprimanding Oksanen for practicing medicine without a valid license and for negligence in the death of a patient in March, 1984.

In 1988, Oksanen brought suit against Page Memorial and the members of its medical staff. He contended that the revocation of his staff privileges and other activities allegedly engaged in by the defendants violated sections one and two of the Sherman Act, the Virginia Antitrust Act, and other state law provisions. On the section one claim, the district court recognized that as a matter of law the defendants may have lacked the capacity to conspire, but did not base its decision on intracorporate immunity. Instead, the court concluded that Oksanen had failed to prove the existence of a conspiracy. The court then granted summary Judgment for the defendants on all counts.

Oksanen appealed from that judgment. The defendants argued that they were legally incapable of conspiring. A panel of this circuit concluded, to the contrary, that defendants had the capacity to engage in an antitrust conspiracy. The panel went on to reverse the grant of summary judgment, ruling that Oksanen had not been given an adequate opportunity for discovery. *Oksanen v. Page Memorial Hosp.*, 912 F.2d 73 (4th Cir. 1990).

The court then voted to rehear the case en banc. We shall address appellant's federal antitrust law claims in Sections II through IV followed by his various state law claims in Section V.

II.

To prove a violation of section one of the Sherman Act, 15 U.S.C. § 1, a plaintiff must show the existence of an agreement in the form of a contract, combination, or conspiracy that imposes an unreasonable restraint on trade. *E.g., White & White Inc. v. American Hosp. Supply Corp.*, 723 F.2d 495, 504 (6th Cir. 1983).[1] Oksanen

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[1] Demonstrating that an alleged agreement would affect interstate commerce has been treated as a jurisdictional prerequisite to bringing a section one claim that must be satisfied before the other two elements of such a claim are addressed. *See Summit Health, Ltd. v. Pinhas*, 59 U.S.L.W. 4493 (1991). Oksanen notes that the hospital and its staff purchase supplies and receive insurance payments from out-of-state sources and that they treat non-Virginia residents. Oksanen further alleges that the peer review process was used as a vehicle to punish him for sending patients to other area hospitals, which were engaged in interstate commerce. Finally, Oksanen argues that

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advances [p. 8] two different but related theories on whether an impermissible contract, combination, or conspiracy existed in this case. He first contends that during the peer review process, the medical staff conspired with the hospital to exclude him from practicing medicine at Page Memorial. Oksanen also argues that the members of the medical staff, during the peer review process and on other occasions, conspired among themselves to exclude him from the market. We shall address these arguments in this section and in Section III address the restraint of trade issues.

A.

Section one of the Sherman Act applies only to concerted action; unilateral conduct is excluded from its purview. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984). Proof of concerted action requires evidence of a relationship between at least two legally distinct persons or entities. Oksanen contends that this plurality requirement is met in this case because the medical staff and the hospital are legally discrete entities. We think, to the contrary, that the staff is acting as an agent of Page Memorial Hospital during the peer review process and as such is indistinct from the hospital.

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the peer review process serves a gatekeeping function so that an unfavorable review from Page Memorial could affect his ability to obtain staff privileges at other hospitals. Based on the similarity between Oksanen's allegations and those allegations considered by the *Pinhas* Court to affect interstate commerce, we believe that the jurisdictional requirement for an antitrust action is met in this case.

Our view is premised upon the principle of intracorporate immunity announced in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). *Copperweld* established that the unilateral actions of a single enterprise are immune from the coverage of section [p. 9] one despite any corresponding restraint on trade. As an example of unilateral conduct, the Court pointed to agreements among corporate officers. "The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals." *Id.* at 769. Applying that reasoning, the Court held that agreements between a parent corporation and its wholly owned subsidiary are not concerted actions for purposes of section one. The Court noted that a parent and its subsidiary always have a unity of interest so the law's concern with a sudden joining of independent interests is not present in such a case. *Id.* at 771.

We think a similar unity of interest is present in the relationship between the hospital and its staff, both of which seek to upgrade the quality of patient care. Oksanen contends, however, that intracorporate immunity should not shield the participants in the peer review process for the simple reason that the medical staff and the hospital, unlike a corporation and its officers, are legally separate entities. *Bolt v. Halifax Hosp. Med. Ctr.*, 891 F.2d 810, 819 (11th Cir. 1990). This argument, however, ignores the functional approach to the question of intracorporate characterization which we believe is mandated by the *Copperweld* decision. *Copperweld* in fact criticized the notion that a corporation can conspire with

itself because this "looks to the form of an enterprise's structure and ignores the reality." 467 U.S. at 772. Consistent with *Copperweld*, we must examine the substance, rather than the form, of the relationship between the hospital and the medical staff during the peer review process. When we do so, we find ourselves aligned with those circuits recognizing the applicability of intracorporate immunity to peer review proceedings. *Nurse Midwifery Assoc. v. Hibbett*, 918 F.2d 605 (6th Cir. 1990); *Nanavati v. Burdette Tomlin Memorial Hosp.*, 857 F.2d 96 (3d Cir. 1988).

Like a corporation delegating authority to its officers, the Board of Trustees at Page Memorial delegated peer review decisionmaking in the first instance to the medical staff. "As such, with regard to these decisions, the medical staff operated as an officer of a corporation would in relation to the corporation." *Weiss v. York Hosp.*, 745 F.2d 786, 817 (3d Cir. 1984). In effect, the medical staff was working as the Board's agent under an "internal 'agreement' to implement a single, unitary firm's policies" of evaluating the conduct and competence [p. 10] of those to whom the hospital extended privileges. *Copperweld*, 467 U.S. at 769.

This type of delegation of authority does not implicate the concerns of section one of the Sherman Act. The decision to conduct the peer review process does not represent the sudden joining of independent economic forces that section one is designed to deter and penalize. "[T]here are no strong antitrust concerns that would warrant a departure from traditional concepts of agency since the hospital and medical staff are not competitors." *Nurse Midwifery*, 918 F.2d at 614. Far from being a competitor

with the hospital, the medical staff was in fact a natural component of the hospital's management structure.

Indeed, the Supreme Court has cautioned that adopting a rule that penalized coordinated conduct "simply because a corporation delegated certain responsibilities to autonomous units might well discourage corporations from creating divisions with their presumed benefits." *Copperweld*, 467 U.S. at 771. Penalizing coordinated conduct in the health care context would not only discourage hospitals from investing authority in their medical staffs, but it would also discourage staff members from accepting and exercising delegated authority if to do so involved the omnipresent fear of antitrust treble damage suits. One presumed benefit of authorizing the medical staff to conduct the initial peer review is that it allows physicians with expertise in medical care to make an initial evaluation of whether other physicians have achieved a certain level of professional competence. *See* Havighurst, *Doctors and Hospitals: An Antitrust Perspective on Traditional Relationships*, 1984 Duke L.J. 1071, 1130 n.192. This and other benefits achieved by delegating peer review to the medical staff would likely be lost if the participants in the peer review process were potentially subject to antitrust liability any time they made a decision. Such a threat to the peer review process is at odds with Congress' intent to encourage the process by granting immunity to participants.[2]

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[2] In the Health Care Quality Improvement Act of 1986, Congress specifically found that "the threat of . . . treble

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[p. 11] It was this critical element of delegated authority that was absent in one of the principal cases relied on by appellant, *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1140 (9th Cir. 1988). In *Oltz*, a group of anesthesiologists acted on their own initiative in their attempt to coerce a hospital to abandon its contract with a nurse anesthetist and enter into an exclusive contract with them. These actions were taken outside the peer review process and did not involve an entire medical staff. Because the "anesthesiologists were not empowered to act for St. Peter's," we believe the case has little relevance to the determination of whether a hospital can conspire with its medical staff during the peer review process. 861 F.2d at 1450.

As an additional aspect of our functional inquiry into the relationship between the hospital and the medical staff, we must assess the degree of control the hospital exercised over the staff during the peer review process. In *Copperweld*, the parent corporation's ability to exercise control over its subsidiary if the subsidiary failed to act in its best interests influenced the Court's decision that the coordinated activities of the two entities should be treated as that of a single enterprise. 467 U.S. at 771-72. Here, although the Board of Trustees sought advice from

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damage liability under Federal anti-trust law unreasonably discourages physicians from participating in effective professional peer review." Congress further noted that "[t]here is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review." 42 U.S.C. § 11101 (4) & (5). This legislation, however, is not controlling in this litigation which concerns events occurring before the Act's effective date.

the medical staff, the Board could modify the staff's recommendations at any time and it retained ultimate responsibility for all of the hospital's credentialing decisions. In this regard, the by-laws of Page Memorial Hospital provide that "[n]o assignment, referral, or delegation of authority by the Board of Trustees to . . . the Medical Staff . . . shall preclude the Board of Trustees from exercising the Authority required to meet its responsibility for the conduct of the hospital." The Board's ultimate control over peer review decisions enables it to employ peer review to pursue its interests.

Moreover, a hospital's interests generally would not be furthered by engaging in a conspiracy to restrain competition among doctors. Given that hospitals compete for the admission of patients, they have an incentive to maximize the number of physicians to whom they grant admitting and staff privileges. If a physician is qualified and does not disrupt the hospital's operations, it is in the hospital's interest to include, not exclude, that physician. *See Weiss*, 745 F.2d at 828. These incentives apply with particular force to this case. Page Memorial was suffering a decline in admissions during the 1980s. As a [p. 12] result, its economic incentive was to maintain the admitting privileges of qualified physicians in the area.

Oksanen seems to suggest that Page Memorial's incentives were different because it wanted to exclude him from the staff in retaliation for referring patients to other hospitals. Appellant's argument ignores the realities of the marketplace. If the hospital dismissed him for illegitimate reasons, he could presumably continue to treat at least some of his patients at Shenandoah Memorial Hospital where he remained on staff. Moreover, Page

Memorial had to anticipate that Oksanen might obtain admitting privileges at another competitor hospital eager to accord privileges to a physician with his self-proclaimed large patient base. In sum, a hospital "makes its decisions to serve its own interests, not those of the staff, and thus should not be seen as a possible co-conspirator with them." P. Areeda and H. Hovenkamp, *Antitrust Law*, ¶ 1471b (1990 Supp.).

B.

Oksanen argues that even if the hospital and the medical staff are part of the same enterprise, intraenterprise immunity is inapplicable because individual doctors on the medical staff had personal stakes in the outcome of the peer review process. According to Oksanen, the physicians' personal states are their medical practices that would benefit if he were eliminated as a competitor. This circuit has observed that an exception to the general rule that a corporation cannot conspire with its officers or agents "may be justified when the officer has an independent personal stake in achieving the corporation's illegal objective." *Greenville Pub. Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974). Since *Greenville* was decided, however, this exception has expanded and in the process has been criticized for, among other things, becoming an exception that threatens to swallow the rule. *See Nurse Midwifery*, 918 F.2d at 615; P. Areeda, *Antitrust Law*, ¶ 1471 (1986).

Given the force of these criticisms, we decline to extend the personal stake exception beyond the rationale underlying the *Greenville* decision. There it was held that

the president of the defendant company could conspire with it where he had a financial interest in another firm that competed with the plaintiff and would directly bene- [p. 13] fit if the plaintiff was eliminated as a competitor. 496 F.2d at 400. Here, only one member of the medical staff, Dr. Dale, could be said to have been in competition with Oksanen when any of the disputed peer review decisions occurred. Dr. Dale's areas of practice apparently overlapped somewhat with Oksanen's, but Dale did not begin practice at Page Memorial until August, 1983 – well after much of the basis for disciplining Oksanen was established – and he did not take part in the proceedings leading to Oksanen's suspension. Dr. Holsinger was a family practitioner, like Oksanen, but he was not accepting new patients after 1982. Drs. Horng and Ancheta did not compete with Oksanen, but were surgeons who looked to the general practitioners for referrals. Thus, it is unclear whether any decision to eliminate Oksanen from the market would directly benefit the members of the medical staff. Drs. Holsinger, Horng, and Ancheta could conceivably have attained some benefits in the long-run if their critic, Oksanen, was no longer practicing at Page Memorial. We doubt, however, that these indirect economic interests justify a personal stake exception.

In any event, the more important aspect of *Greenville* for the purposes of peer review is the degree of control the officer or agent with the independent interest exercised over the defendant firm's decision-making process. If the officer cannot cause a restraint to be imposed and his firm would have taken the action anyway, then any independent interest is largely irrelevant to antitrust analysis. *See* P. Areeda, *Antitrust Law*, ¶ 1471d & g (1986).

In *Greenville*, the individual who had an interest in another firm was also the defendant company's president, director, and shareholder. Consequently, he could control the defendant company's decisions.

Here, by contrast, the medical staff had no such control. "To give advice when asked by the decisionmaker is not equivalent to being the decisionmaker itself." *Pennsylvania Dental Ass'n. v. Medical Serv. Ass'n*, 745 F.2d 248, 259 (3d Cir. 1984). The Board of Trustees at Page Memorial requested and encouraged the medical staff to take corrective action against Oksanen. The Board in the end retained authority over staff privilege decisions at Page Memorial. Because the challenged decision was subject to review by the hospital and because decisionmaking authority in Dr. Oksanen's case was dispersed among a number of individuals, the personal stake exception is inapplicable. [p. 14] We thus conclude that under the principle of intracorporate immunity, Page Memorial and its medical staff lacked the capacity to conspire during the peer review process.

C.

The question remains whether the medical staff has the capacity to conspire among itself either during peer review or at other times. We recognize that a medical staff can be comprised of physicians with independent and at times competing economic interests. As a result, when these actors join together to take action among themselves, they are unlike a single entity and therefore they have the capacity to conspire as a matter of law. *See Nurse Midwifery*, 918 F.2d at 614. To conclude that members of

the medical staff have the capacity to conspire among themselves does not mean, however, that every action taken by the staff satisfies the contract, combination, or conspiracy requirement of section one. *See Cooper v. Forsyth County Hosp. Auth.*, 789 F.2d 278, 281 n.12 (4th Cir. 1986); *Bolt*, 891 F.2d at 819. The Supreme Court in *Monsanto Co. v. Spray-Rite Service Corp.* established the governing standard for what constitutes sufficient evidence to permit the inference of an antitrust conspiracy:

> [T]here must be evidence that tends to exclude the possibility of independent action. . . . That is, there must be direct or circumstantial evidence that reasonably tends to prove . . . a conscious commitment to a common scheme designed to achieve an unlawful objective.

465 U.S. 752, 768 (1984).

Oksanen seems to suggest that the fact that the medical staff met and took action against him through the peer review process proves the existence of a conspiracy. Of course, "mere contacts and communications, or the mere opportunity to conspire . . . is insufficient evidence from which to infer an antitrust conspiracy in the context of the denial of hospital . . . privileges." *Cooper*, 789 F.2d at 281. Simply making a peer review recommendation does not prove the existence of a conspiracy; there must be something more such as a conscious commitment by the medical staff to coerce the hospital into accepting its recommendation. To speak of a conspiracy among a medical staff [p. 15] during the peer review process is not very meaningful in antitrust terms if the staff lacks the final authority to implement any agreement that it does reach. In this case, there is no evidence that the staff

attempted to usurp the Board's power to make the final decision on Oksanen's status. Nor is there any evidence that the staff illicitly agreed to exclude Oksanen from the market or engaged in anticompetitive activity outside the official meeting and hearing process.

"That the challenged conduct . . . is consistent with legitimate activities also weighs against inferring a conspiracy." *Cooper*, 789 F.2d at 282 n.14. Here, the conduct of a peer review proceeding, a proceeding mandated by state law and by accrediting agencies, is certainly a legitimate activity designed to enhance the quality of care and to provide a harmonious working environment for all the hospital's staff. That the medical staff's actions during the peer review process were legitimate is further evidenced by the fairness of the procedures used to discipline Oksanen. The defendants made many attempts to resolve the complaints against Oksanen short of taking formal disciplinary actions. When disciplinary action finally was taken, it was incremental: Oksanen was initially placed on probation and only later were his privileges permanently revoked after additional complaints were received about his conduct. Additionally, before Oksanen's privileges were suspended for the first time, a hearing was held at which he was represented by counsel and had the opportunity to call witnesses.

We are not suggesting that the antitrust laws are designed to achieve fairness or due process, but when due process is accorded a disgruntled physician it only enhances the legitimacy of a hospital and medical staff's actions. *See* Havighurst, *Doctors and Hospitals*, 1984 Duke

L.J. at 1132-33; *see also* 42 U.S.C. § 11112 (according immunity from antitrust litigation to peer reviewers when certain procedural safeguards are observed). The litany of complaints from a variety of sources concerning Dr. Oksanen provides ample evidence that the doctors on the staff were justified in disciplining a fellow physician who was perceived to be both unprofessional and uncooperative. Where, as here, the peer review process has been operating in accordance with proper procedures, under the aegis of the hospital, and with a substantial basis in the evidence, the likelihood of an anti-trust conspiracy is also substantially diminished.

[p. 16] Oksanen, however, points to evidence of actions taken outside of the peer review context that he claims demonstrate that the medical staff engaged in a group boycott of him. For instance, he contends that the medical staff acted in a concerted refusal to provide on-call coverage for him. Dr. Holsinger, however, apparently had no obligation to provide such coverage because of his seniority. Dr. Dale continued to provide on-call coverage for Oksanen through June 1984, while Drs. Ancheta and Horng apparently declined to provide such coverage. The choice of these two doctors not to provide on-call coverage can readily be explained, however, as a result of their earlier alienation from the quarrelsome Oksanen. Quite likely, the medical staff members made independent decisions not to provide assistance to Oksanen when they could not expect much cooperation in return. Such manifestations of human nature are not properly regarded as conspiratorial. Similarly, the other evidence that Oksanen points to in support of his boycott allegations is also the

product of his own failure to comply with hospital regulations or the result of individual choices by hospital or medical staff members rather than of any concerted action among the medical staff.

Oksanen complains that he was unable to obtain better evidence of a conspiracy among the medical staff because the district court granted summary judgment before he had the opportunity to complete adequate discovery. According to Oksanen, that limitation combined with the particular importance of discovery in antitrust cases means that we should be hesitant to conclude that he has failed to prove that a conspiracy existed among the medical staff.

We believe that discovery was well tailored by the district court to address the pivotal issue in a denial of privileges case: the degree of control the hospital exercised over the peer review process. When a hospital's administration initiates a peer review proceeding and maintains control over it, the likelihood that the medical staff made a meaningful and conscious commitment to restrain trade is markedly decreased. This is not to say, of course, that antitrust concerns would be implicated whenever a medical staff initiates peer review proceedings. The antitrust laws do not prevent physicians from taking legitimate disciplinary action against unprofessional or incompetent practitioners. Many professions have long placed considerable faith in self-regulation, and it would be a blow to public confidence in these [p. 17] professions if the utility of these measures was impaired by an unjustifiably expansive reading of the antitrust laws with their concomitant burdens of discovery.

In this case, the district court had before it thirty-five exhibits submitted by Oksanen, including 690 pages of transcripts from joint conference committee meetings. This voluminous evidence demonstrated that the hospital administrator and the Board, not the medical staff, initiated the actions taken against Oksanen. In fact, the medical staff expressly failed to take advantage of at least one opportunity presented by the hospital administration to discipline Oksanen, which goes far to belie Oksanen's theory of a staff conspiracy. Even with additional discovery, Oksanen would be hard pressed to foreclose the likelihood that the alleged conspirators acted independently. Furthermore, additional discovery would not diminish the fact that the complaints lodged against Oksanen provided a legitimate basis for the corrective actions taken against him. Oksanen had the opportunity to challenge the validity of these allegations in his submissions on summary judgment.

Because Oksanen received adequate discovery on the key issues in his suit, the case was ripe for summary judgment. *See Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (approving the use of summary judgment in complex antitrust litigation). This court and others, both before and after *Matsushita*, recognized that summary judgment is an important tool for dealing with antitrust cases. *See Steuer v. National Med. Enterps., Inc.*, 672 F. Supp. 1489, 1500-01 (D.S.C. 1987) (collecting cases). "[T]he very nature of anti-trust litigation encourages summary disposition of such cases when permissible." *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 475 (7th Cir. 1988). While parties should always be provided

an adequate opportunity in discovery to prove a potentially meritorious case, the process should not become so exhaustive and so time consuming that even a favorable judgment will prove hollow. Unnecessary discovery also has the potential, in and of itself, to damage the legitimate purposes of the peer review process. Within this framework, Oksanen has simply failed to meet his summary judgment burden of establishing that "the inference of conspiracy is reasonable in light of the competing inferences of independent action." *Matsushita*, 475 U.S. at 583.

[p. 18] III.

Oksanen also bears the burden of proving under section one of the Sherman Act that any concerted action that did take place caused an "antitrust injury" by imposing an unreasonable restraint on trade. The focus of the antitrust laws is on promoting competition. *National Collegiate Athletic Assn. v. Board of Regents*, 468 U.S. 85, 103 (1984). As a result, a plaintiff cannot demonstrate the unreasonableness of a restraint merely by showing that it caused him an economic injury. For example, the fact that a hospital's decision caused a disappointed physician to practice medicine elsewhere does not of itself constitute an antitrust injury. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 31 (1984). If the law were otherwise, many a physician's workplace grievance with a hospital would be elevated to the status of an antitrust action. To keep the antitrust laws from becoming so trivialized, the reasonableness of a restraint is evaluated based on its impact on competition as a whole within the relevant market. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S.Ct. 1884 (1990).

To assess the reasonableness of a restraint on trade, courts have taken one of two approaches. "In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality – they are 'illegal *per se*.' " *National Soc. of Prof. Engineers v. United States*, 435 U.S. 679, 692 (1978). Certain forms of agreements, such as varieties of group boycotts, have been classified as per se violations. *See FTC v. Superior Ct. Trial Lawyers Ass'n.*, 110 S.Ct. 768 (1990). Oksanen seems to contend that the combined actions of the hospital and the medical staff amounted to a group boycott and should be classified as per se violations of the Act. The Court has cautioned, however, that the category of restraints classed as group boycotts should not be expanded indiscriminately, particularly where, as here, the economic effects of the restraint are far from clear. *FTC v. Indiana Fed. of Dentists*, 476 U.S 447, 458-59 (1986).

We believe that the second approach to analyzing restraints, the rule of reason, is applicable to this case. Under the rule of reason, Oksanen bears the burden of proving that the actions of the defendants have unreasonably restrained trade. *See, e.g., Hyde*, 466 U.S. at 29. To meet this burden, Oksanen must prove what market he con- [p. 19] tends was restrained and that the defendants played a significant role in the relevant market. Absent this market power, any restraint on trade created by the defendants' actions is unlikely to implicate section one.

Oksanen asserts, with little proof, that Page County is the relevant market and that Page Memorial and its medical staff exert complete control over the market. Although Page Memorial may be where Oksanen prefers

to practice, this preference alone does not justify excluding other hospitals and other doctors from the relevant market definition. *See Steuer*, 672 F. Supp at 1510 n.19. Oksanen's narrow market definition violates a fundamental tenet of antitrust law that the relevant market definition must encompass the realities of competition. *See United States v. Grinnell Corp.*, 384 U.S. 563, 572-73 (1966). The defendants note that they compete with hospitals and doctors in surrounding counties. For example, four hospitals, aside from Page Memorial, are situated within twenty-five miles of Page County. Based on statistics derived from a 1979 study, Page Memorial's share of the market served by these five hospitals is 5.2%. Moreover, 53.8% of Page County's residents went to hospitals other than Page Memorial, including Rockingham Memorial which attracted 30% of all Page County residents in 1979. Under these circumstances, we doubt whether the defendants possess the market power necessary to significantly restrain trade.

Of course, a detailed inquiry into a firm's market power is not essential when the anticompetitive effects of its practices are obvious. *Superior Court Trial Lawyers Ass'n.*, 110 S.Ct. at 780-82. If any anticompetivite effects exist in this case, however, they are far from clear. For instance, Oksanen has neither demonstrated a rise in the price of medical services above a competitive level nor a decrease in the supply of doctors in the relevant market. *See Nanavati*, 857 F.2d at 121 n.24. In fact, from August 1983 to 1987 seven additional doctors began practicing at Page Memorial. The aphorism that "the antitrust laws were enacted for 'the protection of *competition*, not *competitors*' " rings true in this case. *Atlantic Richfield*, 110

S.Ct. at 1891 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). This case is not one in which a representative of a class of competitors is being excluded from the market. *Cf. Oltz* (attempt to exclude nurse anesthetist); *Cooper* (attempt to exclude podiatrists); [p. 20] *Weiss* (attempt to exclude osteopath). Oksanen, as an individual competitor, may have been hurt by the hospital's decision to revoke his privileges, but there is no evidence that competition as a whole in the relevant market has been harmed.

Moreover, the peer review process, by policing the competence and conduct of doctors, can enhance competition. "By restricting staff privileges to doctors who have achieved a predetermined level of medical competence, a hospital will enhance its reputation and the quality of care that it delivers." *Weiss*, 745 F.2d at 821 n.60. Similarly, the friction created between a hospital and a doctor with a legacy of trouble in interpersonal relationships can decrease efficiency, discourage other qualified doctors from joining the staff, and detract from a hospital's ability to provide quality patient service. *Id.*

In sum, the anticompetive effects are by no means so clear and one-sided as Oksanen would have them, and the revocation of Oksanen's staff privileges, while undoubtedly impacting adversely on his practice, has not been shown to have had any adverse impact on competition in the relevant market. Consequently, his section one claim fails.

IV.

Oksanen further contends that the defendants violated section two of the Sherman Act by participating in the offenses of monopolization and conspiracy to monopolize. While section one of the Act focuses on concerted action, monopolization under section two involves the actions of a single firm to control a market. Here, Oksanen appears to contend that Page Memorial was engaging in efforts to monopolize trade by excluding him from the hospital in response to his referral of patients to other hospitals. Two elements comprise the offense of monopolization: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n.19 (1985) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).

[p. 21] Although some dispute about the relevant market exists among the parties, Oksanen has offered little or no evidence to support his proposed definition of Page County as the relevant market. It is difficult to understand how Oksanen can maintain his proposed market definition since he himself sent a significant number of patients to hospitals outside of Page County. As our prior discussion has indicated, we doubt whether Page Memorial exercised market or monopoly power in a market defined to account for commercial reality.

Even assuming that Oksanen could demonstrate the existence of monopoly power, he must still prove that

Page Memorial willfully acquired such power or sought to maintain it. To satisfy this burden, Oksanen must show "that a jury could find no valid business reason or concern for efficiency in the hospital's choice" to revoke his privileges. *White*, 820 F.2d at 105. As we have noted repeatedly, Page Memorial certainly had valid business and patient care reasons for removing Oksanen before he irremediably poisoned the hospital environment. Consequently, Oksanen has failed to demonstrate the monopolistic intent necessary for a section two claim.

Oksanen also argues that the medical staff conspired with the hospital and among itself to monopolize the market for medical services. These claims merit little discussion. Because the hospital and medical staff lack the capacity to conspire under section one, they also lack the capacity under section 2. *Advanced Health-Care Serv. v. Radford Comm. Hosp.* 910 F.2d 139, 150 (4th Cir. 1990). On the claim that the medical staff conspired among itself, "because we find that appellant[ ] failed to proffer sufficient evidence of a conspiracy in violation of § 1 of the Sherman Act to withstand summary judgment, we accordingly find [his] § 2 claim similarly deficient." *Cooper*, 789 F.2d at 280 n.10.

V.

As Oksanen's final grounds for appeal he asserts three state law claims against the defendants. Specifically, Oksanen contends that the defendants violated the Virginia Antitrust Act, conspired to injure his business in violation of Va. Code § 18.2-500, and that the doctors on the medical staff tortiously interfered in his contractual

relations with a number of parties. We shall briefly address each of these claims.

[p. 22] The Virginia Antitrust Act, with the exception of an interstate commerce component, shares common elements with sections one and two of the Sherman Act. Va. Code Ann. § 59.1-9.1, *et seq.* (1990). In fact, the Virginia Act specifically provides that it is to be interpreted and applied in harmony with federal antitrust law. Va. Code Ann. § 59.1-9.17. Because Oksanen has failed to establish his restraint of trade and monopoly claims under federal law, his state law antitrust claims likewise fail. *See Satellite Television, Inc. v. Continental Cablevision Inc.*, 714 F.2d 351, 358 n.13 (4th Cir. 1983).

In Oksanen's second state law count he alleges that the defendants conspired to injure his business in violation of Va. Code § 18.2-500. As our review of the evidence has indicated, Oksanen has failed to establish that any of the defendants conspired against him, much less conspired with the intent to maliciously injure him as required under § 18.2-500. *Allen Realty Corp. v. Holbert*, 227 Va. 441, 318 S.E. 2d 592, 596 (1984).

Oksanen also contends that the doctors on the medical staff interfered in his contractual relations with (1) Page Memorial, (2) a nursing home, and (3) his individual patients. We agree with the district court that plaintiff has simply failed to introduce the evidence necessary to sustain his burden of proof on these issues.

VI.

This case illustrates well the dilemma that hospitals face when they consider disciplining a physician by

altering his admitting privileges. On the one hand, if the hospital failed to discipline a physician against whom documented complaints were legion, the efficiency of the entire institution could be affected and the hospital could even be exposing itself to malpractice liability. Yet, if the hospital takes corrective action, it and its medical staff face the prospect of a disgruntled physician bringing an antitrust suit against them.

In our view, the antitrust laws were not intended to inhibit hospitals from promoting quality patient care through peer review nor where the laws intended as a vehicle for converting business tort claims into antitrust causes of action. While we cannot say that no peer review decision would ever implicate the Sherman Act's concern for compe- [p. 23] tition, this assuredly is not such a case. Page Memorial simply took measured steps to discipline an imperious physician. In taking these actions, Page Memorial and its medical staff have violated neither federal nor state law. The judgment of the district court is therefore

AFFIRMED.

MURNAGHAN, Circuit Judge, dissenting:

Of late, this Circuit, sitting *en banc,* has brought a number of plaintiffs' quests to an end at the summary judgment stage. *See, e.g., McCormick v. AT&T Technologies, Inc.,* 934 F.2d 531 (4th Cir. 1991) (*en banc*) (affirming district court's dismissal of plaintiff's claim on summary judgment); *Gould v. United States Dep't of Health & Human Serv.,* 905 F.2d 738 (4th Cir. 1990) (*en banc*) (same), *cert. denied,* 111 S.Ct. 673 (1991); *Paroline v. Unisys Corp.,* 900 F.2d 27 (4th Cir. 1990) (*en banc*) (same). *But see Rowland v.*

Patterson, 882 F.2d 97 (4th Cir. 1989) (*en banc*) (reversing district court's dismissal of plaintiffs' claims on summary judgment). Perhaps one explanation may be the favorable reception that summary judgment has received from the Supreme Court in recent years. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

But I do not believe that the Supreme Court has moved further to close the gates of the judiciary by encouraging district courts prematurely to stay discovery before discovery has been completed. Indeed, the Court has expressed concern that plaintiffs be given appropriate opportunity to complete discovery. In *Anderson*, the Court wrote that "the plaintiff must present affirmative evidence . . . even where the evidence is likely to be within the possession of the defendant, *so long as the plaintiff has had a full opportunity to conduct discovery.*" 477 U.S. at 257 (emphasis added). In *Celotex*, the Court emphasized that "[t]he parties had conducted discovery, and no serious claim can be made that respondent was in any sense 'railroaded' by a premature motion for summary judgment." 477 U.S. at 326. Indeed, in *Matsushita*, an antitrust case, the Court noted that the petitioners had "several years of detailed discovery. . . . " 475 U.S. at 578. Thus the Supreme Court has not altered the position that "in antitrust cases, [p. 24] where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1976) (*quoting Poller v. Columbia Broadcasting*, 368 U.S. 464, 473 (1962)); *see Huelsman v.*

Civic Center Corp., 873 F.2d 1171, 1174 (8th Cir. 1989); *Greensboro Lumber Co. v. Georgia Power Co.*, 844 F.2d 1538, 1545-46 (11th Cir. 1988).[1]

Yet the majority has thrown out Oksanen's suit without permitting him a reasonable time to complete discovery. Oksanen filed his complaint in June 1988. The defendants answered in July and in September, 1988 filed motions to dismiss and, in the alternative, for summary judgment. The judge scheduled argument on the motions for November 7, 1988. Oksanen responded to interrogatories and requests for production of documents by two of the defendants. He served requests for interrogatories and depositions on the defendants; however, the defendants did not respond. After the November argument, the judge stayed all discovery and then granted the motion for summary judgment and dismissal.

Both the district court judge and the majority found persuasive the extensive official paper record presented to the court. Few defendants in antitrust cases will have problems flooding the court with voluminous materials supporting the absence of any violations. Harder, however, is the plaintiff's burden of showing an antitrust violation. But the difficulty of the task does not justify refusing to permit discovery. Like the district court, the majority bases its disposition on the lack of evidence

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[1] The majority's cite to *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473 (7th Cir.), *cert. denied*, 488 U.S. 852 (1988), is inapposite. In *Collins*, discovery had been completed prior to summary judgment and the court noted that the district judge "painstakingly examined the voluminous discovery material. . . . " *Id.* at 475.

presented by Oksanen of conspiracy among the medical staff.[2] I would be surprised indeed if the medical staff would have openly discussed, at any meeting with records available to Oksanen, [p. 25] a plan to conspire against him. Thus, Oksanen, without access to the files or minds of the defendants, obviously could not obtain such evidence in the absence of discovery.

The majority, recognizing Oksanen's inability to complete discovery, claims that "[w]hen a hospital's administration initiates a peer review proceeding and maintains control over it, the likelihood that the medical staff made a meaningful and conscious commitment to restrain trade is markedly decreased." Slip op. at 16. It continues by explaining that the evidence presented by the defendants support their side of the story, Oksanen "would be hard pressed to foreclose the likelihood that the alleged conspirators acted independently," and "additional discovery would not diminish the fact that the complaints lodged against Oksanen provided a legitimate basis for the corrective actions taken against him. Slip op. at 17. Therefore, it concludes Oksanen had adequate discovery.

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[2] For example, in part C, the majority declares that "there is no evidence that the staff attempted to usurp the Board's power . . . " Slip. op. at 15. It adds, "Nor is there any evidence that the staff illicitly agreed to exclude Oksanen from the market or engaged in anticompetitive activity outside the official meeting and hearing process." *Id.* And it guesses as to the motivation of two doctors' refusal to provide on-call coverage for him: "Quite likely, the medical staff members made independent decisions not to provide assistance to Oksanen when they could not expect much cooperation in return." Slip. op. at 16.

That the defendants have a good story and a paper record should not bar a plaintiff from attempting to demonstrate the defendants' explanation is a cover for less permissible actions. That Oksanen will be "hard pressed" does not justify the majority's preventing him from trying. That the complaints present one plausible explanation should not end Oksanen's effort to establish another. The discovery presumption created by the majority will bar all plaintiffs save those who have the "smoking gun" already clutched in their hands. With the courts crowded, it may be tempting to hold that every plaintiff may not deserve the proverbial day in court, but no exceptional circumstances justified staying Oksanen's discovery. If things are as the majority has prematurely decided, Oksanen's completion of discovery will bring about no different result. But a guess is not as satisfactory as a conclusion reached after full discovery with pertinent facts available to the district judge. The grant of summary judgment may ultimately be shown to be correct, but that should come after adequate opportunity for discovery. There was no such opportunity here.

I, therefore, respectfully dissent.

Chief Judge Ervin, Judge Phillips, and Senior Circuit Judge Butzner have joined in this dissent.

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 89-1768

OWEN D. OKSANEN, M.D.,

Plaintiff-Appellant,

versus

PAGE MEMORIAL HOSPITAL; J. R. HOLSINGER, M.D.; ROMULO ANCHETA, M.D.; FANG S. HORNG, M.D.; JAMES G. DALE, M.D.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Virginia, at Harrisonburg. James H. Michael, Jr., District Judge. (C/A No. 88-166(H))

Argued: March 6, 1990 Decided: August 9, 1990

Before MURNAGHAN, Circuit Judge, BUTZNER, Senior Circuit Judge, and KAUFMAN, Senior United States District Judge for the District of Maryland, sitting by designation.

Reversed and remanded by published opinion. Senior Judge Kaufman wrote the opinion, in which Judge Murnaghan and Senior Judge Butzner joined.

ARGUED: Edward B. Lowry, MICHIE, HAMLETT, LOWRY, RASMUSSEN & TWEEL, P.C., Charlottesville, Virginia, for Appellant. Gregory Thomas St. Ours, WHARTON, ALDHIZER & WEAVER, Harrisonburg, Virginia, for Appellees. **ON BRIEF:** Robert W. Jackson, MICHIE, HAMLETT, LOWRY, RASMUSSEN & TWEEL, P.C., Charlottesville, Virginia; Sheldon Braiterman, Baltimore, Maryland; Philip C. Stone, WHARTON, ALDHIZER & WEAVER, Harrisonburg, Virginia; Stephen L. Altman, DONAHUE, EHRMANTRAUT & MONTEDONICO, Fairfax, Virginia; Roy V. Wolfe, III, JULIAS, BLATT & BLATT, Harrisonburg, Virginia; Norman F. Slenker, SLENKER, BRANDT, JENNINGS & JOHNSTON, Fairfax, Virginia; Edward M. Burns, II, POINDEXTER, BURNS & MARKS, Waynesboro, Virginia; Lynn Fleming, CREWS & HANCOCK, Richmond, Virginia; Mary S. Meade, MEADE & ASSOCIATES, P.C., Vienna, Virginia, for Appellees.

KAUFMAN, Senior District Judge:

Dr. Owen D. Oksanen appeals the order of the district court granting summary judgment with regard to Oksanen's federal antitrust and pendent state claims. For the reasons stated below, we reverse that order and remand to permit Dr. Oksanen additional discovery, and for whatever trial opportunity to which he may, after such discovery, be entitled.

I.

After finishing a three-year residency at the University of Virginia Hospital in 1978, Dr. Oksanen moved to Luray (Page County), Virginia, to practice family medicine. Upon arrival, Oksanen rejected an offer to practice in the office of defendant Dr. J.R. Holsinger (another

general practitioner), preferring instead to open his own office as a sole practitioner. After a probationary period of one year, Dr. Oksanen applied for full medical privileges at Page Memorial Hospital (Page Memorial), a small (54 beds) community hospital which constitutes the only hospital in Page County. Although Dr. Holsinger opposed Oksanen's application, the appellant received the support of defendants Dr. Fang S. Horng and Dr. Romulo Ancheta, two Page Memorial surgeons, and at least one other of Page Memorial's five-physician staff and his application for full medical privileges was approved.

Soon after Oksanen began practicing at Page Memorial, the administration began receiving complaints about his behavior. From 1979 to 1983, the record reveals a lengthy list of claims of abusive conduct toward nurses, laboratory staff, and administrative personnel.[1] At the same time, Dr. Oksanen's complaints regarding his physician colleagues grew. In his affidavit, Oksanen stated that because of his deep concern over the quality of care at Page Memorial, he began referring many patients to the University of Virginia Hospital and other facilities which, in his opinion, provided a "better quality of specialized medical service." According to Dr. Oksanen, "the principal problems with medical care concerned the failure of Drs. Horng and Ancheta to realize their own limitations as to what surgery should be handled by them and what surgery required better facilities and surgeon[s] . . . . "

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[1] The record also reveals that Dr. Oksanen's practice grew vigorously, as the appellant had approximately 5,000 charts by 1983. According to Dr. Oksanen, the average physician in Luray had 1,000 to 2,000 charts.

In May 1983, with relations between Dr. Oksanen and the nursing staff worsening,[2] hospital administrator John Berry asked the medical staff, which consisted of all the individual defendants except newly arrived general practitioner Dr. James G. Dale, to investigate Oksanen's conduct and take any necessary "corrective action." The medical staff concluded that no disciplinary action was necessary. In July 1983, however, Dr. Oksanen engaged in two incidents which further antagonized the medical staff and the hospital Board of Trustees (Board). First, the appellant, in reaction to a letter sent by Board President T.C. Berrey to all physicians, told the Board that its attempt to create a more hospitable environment was "demeaning and insulting." Oksanen added that he was "not sure that the collection of individuals that make up the hospital Board have sufficient background, training or what have you to function appropriately in reviewing the activities of physicians." Second, Dr. Oksanen got into a public shouting match with Dr. Horng after Oksanen told one of Horng's patients that a prescribed medication was potentially life-threatening.

• At its next meeting, the Board, in response to the suggestions of Dr. Ancheta (Chief of the Medical Staff) and Administrator Berry, strongly recommended that the Medical Staff take corrective action. After reviewing testimony from 19 witnesses regarding the appellant's behavior, the Executive Committee of the Medical Staff voted

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[2] Although relations between the nursing staff and all Page Memorial physicians had deteriorated, the nurses were particularly upset over Oksanen's public reprimand of a nurse and her supervisor.

3-1 (with Dr. Oksanen the only dissenter) to revoke Dr. Oksanen's staff privileges. The Board of Trustees, after considering the protests of Dr. Oksanen and his lawyer, voted 9-2 to suspend Oksanen's privileges for three months (until December 31, 1983), to be followed by a one-year probationary period.

In the wake of Oksanen's suspension, a group called the Concerned Citizens mounted a campaign which resulted in the election of four members to the Board, ousting Dr. Holsinger in the process. Those events, along with newspaper statements made by Dr. Oksanen about the poor quality of surgical care at Page Memorial, did not ease Dr. Oksanen's return to practice in January 1984. After Oksanen was again practicing at Page Memorial, several physicians "embarked," according to the appellant, on a course of selective enforcement of the hospital's regulations, such as refusing to provide emergency room coverage for Oksanen's patients. Additionally, the other doctors refused to cover for Oksanen during his absences or name the appellant to any hospital committees. With complaints about Dr. Oksanen rising again, the Board of Trustees voted in May 1984 to request the medical staff to take further corrective action against him. The Executive Committee of the Medical Staff met on June 22, 1984, and voted to recommend to the Board that Oksanen's staff privileges be revoked permanently. Five days later, Dr. Oksanen resigned from the Page Memorial medical staff.

After his resignation, Dr. Oksanen claimed that the Page Memorial staff refused his patients access to ancillary services and diverted his patients to other

physicians.[3] However, Oksanen continued to practice medicine in Virginia through 1984 and subsequently was reprimanded, in accordance with a consent decree by the Virginia Board of Medicine, for practicing medicine with a suspended license, for negligence in the death of a patient, and for unprofessional conduct. Thereafter, Dr. Oksanen's practice suffered greatly and, after working in a series of part-time physician arrangements, he finally settled in Florida.

II.

On June 13, 1988, Dr. Oksanen filed a complaint in the court below against Page Memorial and Drs. Holsinger, Ancheta, Horng, and Dale, setting forth antitrust claims under Sections 1 & 2 of the Sherman Act, 15 U.S.C. §§ 1-2, and asserting pendent state claims under the Virginia Antitrust Act, and also for civil conspiracy, tortious interference with contract, and defamation.[4] In essence, Dr. Oksanen claimed that the defendants collectively forced him from practice and conspired to restrain competition in, and monopolize, the practice of medicine in Page County. This was done, according to Oksanen, because the defendant physicians felt professionally and economically threatened by the brash "new kid on the block."

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[3] Despite his resignation from Page Memorial, Oksanen remained on staff at Shenandoah Hospital in Woodstock, Virginia, and believed that his privileges there entitled him to use Page Memorial's facilities.

[4] The defamation count was subsequently dropped in plaintiff's amended complaint.

The defendants then filed motions to dismiss and/or for summary judgment, and the district court calendared those motions for oral argument on November 7, 1988. Between June and November 1988, both parties submitted affidavits, transcripts of hospital disciplinary meetings, and correspondence in support of their respective positions. Dr. Oksanen also responded to interrogatories submitted by Drs. Dale and Horng. Dr. Oksanen served his own deposition requests, interrogatories, and production of documents requests on the individual defendants on October 20, 1988. Those discovery requests were never answered, however, because the district court stayed all discovery at the oral argument on November 7, pending a decision on the defendants' motions.

Although discovery had been stayed since the previous November, the district court granted summary judgment in favor of all defendants on June 16, 1989. The district court found that the documentary exhibits and correspondence were insufficient to establish the required concerted action under section 1 of the Sherman Act. Instead, the court concluded that "the recurring litany of complaints concerning [Oksanen] provides ample evidence that the individual defendants were not conspiring to restrain trade or to injure Dr. Oksanen . . . . " Regarding the Sherman section 2 claim, the district court concluded that the "various actions" taken against Oksanen "do not suggest the willful maintenance of monopoly power," but were instead "motivated by professional concerns over the impact of Dr. Oksanen's behavior on hospital morale and, ultimately, on patient care." Finally, the district court dismissed the pendent state claims for

essentially the same reasons. This appeal followed. We conclude that a remand is required.

III.

Section 1 of the Sherman Act requires proof of a "contract, combination . . . , or conspiracy, in restraint of trade." 15 U.S.C. § 1 (1982). "Concerted action is the essence of a Section 1 claim." *Terry's Floor Fashions, Inc. v. Burlington Industries, Inc.*, 763 F.2d 604, 610 (4th Cir. 1985). Here, the alleged conspiracy occurred among the Board members and administrative staff of Page Memorial and its medical staff, all of whom participated in the peer review decision to revoke Dr. Oksanen's privileges. Invoking the intracorporate immunity doctrine, the defendants maintain that, as a matter of law, members of a hospital medical staff are incapable of conspiring with either themselves or with their hospital for Sherman section 1 purposes. We address that threshold legal argument first.

A.

Unilateral conduct by a single entity does not implicate section 1 of the Sherman Act regardless of the magnitude of the restraint on competition. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984). In *Copperweld*, the Supreme Court concluded that "officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy." 467 U.S. at 769. "The officers of a single firm," the Court declared, "are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly

bring together economic power that was previously pursuing divergent goals." *Id.* In indicating that a hospital may be legally incapable of conspiring with its medical staff under section 1, the Third and Sixth Circuits have relied upon the *Copperweld* rule that a corporation cannot conspire with its officers and directors. *See Potters Medical Center v. City Hosp. Ass'n*, 800 F.2d 568, 573 (6th Cir. 1986) (hospital cannot conspire with one of its attorneys and one of its physicians); *Weiss v. York Hosp.*, 745 F.2d 786, 813-17 (3d Cir. 1984) (hospital and medical staff), *cert. denied*, 470 U.S. 1060 (1985).[5] Recently, however, two of

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[5] The Third Circuit in *Weiss* did hold, however, that members of a medical staff could conspire with one another for Sherman section 1 purposes. Judge Becker concluded that each medical staff member "has an economic interest separate from and in many cases in competition with the interests of other medical staff members. Under these circumstances, the medical staff cannot be considered a single economic entity for purposes of antitrust analysis." 745 F.2d at 815. For ourselves, we are not willing to apply *per se* the statement in *Weiss* that a "hospital cannot legally conspire with its medical staff," *id.* at 815; rather, we are of the view that, in a case such as this one, there can be a conspiratorial agreement among medical staff members for purposes of section 1. In so concluding, we note that the intra-medical staff conspiracy issue was not resolved in *Cooper v. Forsyth County Hosp. Authority, Inc.*, 789 F.2d 278, 282 (4th Cir.), *cert. denied*, 479 U.S. 972 (1986). *Compare* 789 F.2d at 281 n.12 (Ervin, J.) ("question[ing]" holding in *Weiss* that "*any* action taken by the medical staff satisfies the 'contract, combination, or conspiracy' requirement of section 1") (quoting *Weiss*, 745 F.2d at 814) (emphasis added), *with id.* at 282 (Motz, J., concurring) ("in my view Section 1 of the Sherman Act clearly prohibits members of a medical-dental staff from agreeing with one another to coerce a hospital's trustees to deny privileges to members of a competing profession . . . . ").

our sister circuits have reached the conclusion, in factual contexts similar to this case, that a hospital and members of its medical staff are separate entities for Sherman section 1 purposes. *Bolt v. Halifax Hosp. Medical Center*, 891 F.2d 810, 819 (11th Cir. 1990); *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1450 (9th Cir. 1988).

In *Bolt*, the Eleventh Circuit noted that the *Copperweld* rule was "necessary [in the corporate context] to prevent erosion of the principle that section 1 does not reach unilateral acts." 891 F.2d at 819. That rule for corporations stood in contrast to the hospital structure, the court concluded, because in the hospital context, "[a] hospital and the members of its medical staff . . . are legally separate entities, and consequently no similar danger exists that what is in fact unilateral activity will be bootstrapped into a 'conspiracy.' " *Id.* Earlier, in *Oltz*, the Ninth Circuit stated that the interests of a medical staff "were not as wed as the ties between a corporation and its officers or employees." 861 F.2d at 1450. Therefore, Judge Hug concluded that the interests of certain anesthesiologists "were sufficiently independent so that the collaborated conduct between the anesthesiologists and [the hospital] coalesced economic power previously directed at disparate goals." *Id.*

We find the approach of *Bolt* and *Oltz* persuasive. "Not only do hospital staff doctors have interests that diverge from each other, but they have interests that may well be out of sync with the interests of the hospital." Blumstein & Sloan, *Antitrust and Hospital Peer Review*, Law & Contemp. Probs. 7, 51 (1988); *see also* Kissam, Webber, Bigus & Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 Calif. L. Rev. 595,

639-40 (1982) (concluding that a medical staff may conspire with its hospital for section 1 purposes because physicians are "outside agents" of the hospital and "independent entrepreneurs"). Here, the physicians on the Page Memorial medical staff operated not as agents of Page Memorial during the peer review process but instead as independent sole practitioners, pursuing in many instances personal economic interests. Consequently, we hold that the peer review decisions of a hospital and its medical staff members may be subject to the penalties of section 1 of the Sherman Act.

B.

That the members of a medical staff may conspire with each other and with hospital personnel does not mean, however, that the conspiracy requirement of section 1 is automatically satisfied. To meet that requirement, Dr. Oksanen must of course also prove that the members actually did conspire. *Bolt*, 891 F.2d at 819. In granting summary judgment with respect to all of Dr. Oksanen's claims, the district court concluded that the plaintiff presented insufficient evidence of conspiratorial conduct. However, the district court reached that conclusion without permitting Dr. Oksanen an opportunity to depose witnesses or serve interrogatories. Although both parties did submit voluminous exhibits and affidavits to the court prior to the summary judgment hearing, the interrogatories sent by the plaintiff had not been returned when the district court stayed all discovery pending the disposition of the motions for summary judgment.

Consequently, Dr. Oksanen argues on appeal that the district court acted without having afforded him any opportunity to discover "the files of the Hospital or any of the doctors or to depose or cross-examine any of the Doctors or any of their potential witnesses." Appellant's Br. at 11. In reviewing the district court's order, we are guided by the Supreme Court's recent exposition of the principles of summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). As recently stated by the Eleventh Circuit, the "common denominator" of those cases "is the [Supreme] Court's caveat that summary judgment may only be decided upon an adequate record." *WSB-TV v. Lee*, 842 F.2d 1266, 1269 (11th Cir. 1988). In *Celotex*, the Court held that Rule 56(c), Fed. R. Civ. P., mandates the entry of summary judgment in certain instances but only "after adequate time for discovery." 477 U.S. at 322. In concluding that the district court had properly granted summary judgment, the Court noted that "[t]he parties had conducted discovery, and no serious claim can be made that [the nonmovant] was in any sense 'railroaded' by a premature motion for summary judgment." *Id.* at 326. Similarly, in *Anderson*, the Court declared that summary judgment should be "refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." 477 U.S. at 250 n.5. Finally, in *Matsushita*, the Court considered it significant that the parties had conducted "several years of detailed discovery." 475 U.S. at 578.

Appellate courts, both before and after the above three cases were decided, consistently have reversed summary judgment dispositions when the nonmovant has not had sufficient opportunities for discovery.[6] In *Sames v. Gable*, 732 F.2d 49 (3d Cir. 1984), the district court granted summary judgment in spite of the fact that plaintiffs' interrogatories remained unanswered. Vacating and remanding for further discovery, the court of appeals emphasized that it had previously "criticized the practice of granting summary judgment motions at a time when pertinent discovery requests remain unanswered by the moving party[.]" 723 F.2d at 51 (citing to and quoting from *Costlow v. United States*, 552 F.2d 560, 564 (3d Cir. 1977) (district court abused its discretion in granting summary judgment with discovery requests outstanding)). An analogous situation presented itself in *Snook v. Trust Co. of Georgia Bank of Savannah*, 859 F.2d 865 (11th Cir. 1988), where the district court had granted summary judgment while plaintiffs' motion to compel documents

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[6] Several circuits have held, however, that nonmovants must invoke Rule 56(f), Fed. R. Civ. P. and bring any remaining discovery to the court's attention in order to preserve the lack-of-discovery argument for appeal. *See, e.g., Reflectone, Inc. v. Farrand Optical Co., Inc.*, 862 F.2d 841, 844 (11th Cir. 1989). Rule 56(f) provides that a district court may "order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had . . . . " Although Oksanen did not ask the district court to issue such a continuance under Rule 56(f), such a request was not required in this case where discovery had been stayed and where interrogatories already issued remained unanswered.

was pending. Reversing, the panel concluded that "[g]enerally summary judgment is inappropriate when the party opposing the motion has been unable to obtain responses to his discovery requests." 859 F.2d at 870. *See also Murrell v. Bennett*, 615 F.2d 306, 310 (5th Cir. 1980).

Permitting adequate discovery before summary disposition applies with even greater force in the antitrust context. The Supreme Court, in *Hospital Bldg. Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976), noted that "in antitrust cases, 'where the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly" (citations omitted). Since *Rex Hospital*, several courts have reversed grants of summary judgment in antitrust cases, especially when the disputed issues revolve around intent and motive. *See Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564, 572 (3d Cir. 1986) (reversing summary disposition on Sherman Act section 1 claim); *George C. Frey Ready-Mixed Concrete v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 555 (2d Cir. 1977). Of course, antitrust plaintiffs are not entitled to boundless discovery, and there are certainly many instances where summary judgment is appropriate in the antitrust context,[7] but we cannot say that this is one of

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[7] *See, e.g., White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 102 (4th Cir. 1987) (summary judgment upheld because "party opposing summary judgment [did not] present evidence that tends to exclude the possibility that the alleged conspirators acted independently"); *Cooper*, 789 F.2d at 281 (same; also noting that "mere contacts and communications, or the mere opportunity to conspire, among antitrust defendants is insufficient evidence from which to infer an anticompetitive conspiracy in the context of the denial of hospital surgical privileges").

those rare cases where discovery may be curtailed to the extent it was curtailed by the district court. Accordingly, without commenting on whether Dr. Oksanen will be able to survive pre-trial motions and get to trial, or prevail ultimately if this case goes to trial, we conclude that he must be permitted further to depose defendants and receive answers to interrogatories. We thus reverse the dismissal of the section 1 count, and remand for further proceedings in the district court.

IV.

Count II of plaintiff's complaint alleged that the defendants violated section 2 of the Sherman Act, 15 U.S.C. § 2 (1982), by engaging in monopolization and conspiracy to monopolize. The district court dismissed the monopolization claim, concluding that the "various actions taken against Dr. Oksanen do not suggest the willful maintenance of monopoly power, but were motivated by professional concerns over the impact of Dr. Oksanen's behavior on hospital morale and, ultimately, on patient care." Relying on its finding of no concerted action in the section 1 count, the district court found the conspiracy claim in the section 2 count deficient as well.

The offense of monopolization under section 2 consists of "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n.19 (1985) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563,

570-71 (1966)). To satisfy the element of willful acquisition or maintenance of monopoly power, "[the plaintiff] must show that a jury could find no valid business reason or concern for efficiency in the hospital's [actions]." *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 105 (4th Cir. 1987). Similarly, the offense of conspiracy under section 2 "requires proof of (1) concerted action, (2) overt acts in furtherance of the conspiracy, and (3) specific intent to monopolize." *Volvo North American Corp. v. Men's Int'l Professional Tennis Council*, 857 F.2d 55, 75 (2d Cir. 1988) (citations omitted).

We cannot say with entire certainty, at this stage of the discovery process, that plaintiff will not be able to demonstrate the necessary monopoly power and willful acquisition of that power, or that the motives of the hospital and the defendant physicians could not be seen as predatory. While on the basis of the record as it presently exists, plaintiff's ability to survive summary judgment with respect to count II would appear doubtful, questions do remain with respect to the motives of the several defendants and the definition of the relevant market area, including whether that market covers all the outlying counties urged by Page Memorial.[8] Thus, the bottom line regarding the present status of plaintiff's section 2 claim is that, as we have stated *supra* with

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[8] The appellees argue that Page Memorial has a market share of only 5.2% "when considering the principal counties and cities from which Page Memorial [and other hospitals] draw patients." Appellees' Br. at 34.

respect to the section 1 claim, although dismissal and/or summary judgment may well result after appropriate further discovery, a remand is required on count II as well as count I to permit such discovery.

V.

Having remanded the plaintiff's federal antitrust claims for further discovery, we now turn to the remaining pendent state law claims. In counts III-V of his amended complaint, Dr. Oksanen alleged a violation of the Virginia Antitrust Act, the Virginia Business Conspiracy Act, and a claim for intentional interference with contracts. Relying on its finding that plaintiff failed to produce sufficient evidence of a conspiracy, the district court dismissed counts III and IV. In dismissing count V, the district court held that the loss of staff privileges was not proximately caused by the defendants, but rather by Dr. Oksanen's disruptive behavior.

With respect to the state antitrust claim, Va. Code Ann. §§ 59.1-9.1 *et seq.*, the elements of that cause of action are the same as those required under the Sherman Act (except for the interstate commerce component). *See Satellite Television v. Continental Cablevision*, 714 F.2d 351, 358 n.13 (4th Cir. 1983). Therefore, for the reasons discussed above, we remand the dismissal of that claim for further discovery. As to the state business conspiracy claim, Va. Code Ann. §§ 18.2-499-500, which requires the plaintiff to show a willful, malicious conspiracy with resulting damages, *see Allen Realty Corp. v. Holbert*, 227 Va. 441, 449, 318 S.E.2d 592, 596 (1984), we remand for

similar reasons for a further inquiry into such alleged conspiratorial conduct.

The same result must also apply to count V, the intentional interference with contract claim, which alleged that the defendants interfered with Dr. Oksanen's contractual relationship with Page Memorial, with his patients, and with a nearby nursing home. Finding its "prior evidentiary analysis equally applicable," the district court dismissed those claims because Oksanen had not shown that the defendants' conduct induced or caused a breach or termination in those contractual relationships.[9] Given what has been said, we cannot say now, at this stage of the discovery process, that no genuine issue of material fact exists regarding the cause of Dr. Oksanen's loss of privileges.

VI.

In remanding, we note that once there is an adequate record, the district court may again consider the defendants' motion for summary judgment.

REVERSED AND REMANDED

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[9] To maintain a claim in Virginia for tortious interference with a contract, a plaintiff must demonstrate "(1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) intentional interference inducing or causing a breach or termination of the relationship; and (4) resultant damages to the party whose relationship or expectancy has been disrupted." *Chaves v. Johnson*, 230 Va. 112, 120, 335 S.E.2d 97, 102 (1985).

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 89-1768

OWEN D. OKSANEN, M.D.

Plaintiff – Appellant

v.

PAGE MEMORIAL HOSPITAL;
J. R. HOLSINGER, M.D.;
ROMULO
ANCHETA, M.D.;
FANG S. HORNG, M.D.;
JAMES G. DALE, M.D.

Defendants – Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

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(Filed September 30, 1990)

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to the Court. A majority of judges having voted in a requested poll of the Court to grant rehearing in banc,

IT IS ORDERED that the rehearing in banc is granted.

IT IS FURTHER ORDERED that this case shall be calendared for argument at the February 1991 Session of Court. Within ten days of the date of this order five additional copies of appellant's briefs; five additional copies of appellees' briefs; five additional copies of the

reply brief shall be filed; and appellees will file ten additional copies of Volume 1 and Volume 2 of the joint appendix.

For the Court,

/s/ John M. Greacen
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1768

OWEN D. OKSANEN, M.D.,

Plaintiff – Appellant,

versus

PAGE MEMORIAL HOSPITAL;
J. R. HOLSINGER, M.D.;
ROMULO
ANCHETA, M.D.;
FANG S. HORNG, M.D.;
JAMES G. DALE, M.D.,

Defendants – Appellees.

ORDER
(Filed Oct. 26, 1990)

Appellees have filed an unopposed motion for leave to file supplemental brief.

The Court grants the parties leave to file supplemental briefs, not to exceed 20 pages in length, on the following schedule:

1. Appellees shall serve and file their supplemental brief on or before November 26, 1990;

2. Appellant may serve and file a supplemental brief on or before December 26, 1990.

For the Court

/s/ JOHN M. GREACEN
CLERK

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

OWEN D. OKSANEN, M.D. Plaintiff v. PAGE MEMORIAL HOSPITAL, ET AL., Defendants	Civil Action No. 88-0166 (H)

NOTICE OF APPEAL

(Filed July 14, 1989)

Notice is hereby given that Owen D. Oksanen, Plaintiff above-named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the Order granting the Defendants' motions for summary judgment and dismissing this action, entered on the 16th day of June, 1989.

Respectfully submitted,

OWEN D. OKSANEN

By Counsel

A TRUE COPY, TESTE
JOYCE F. WITT, CLERK
BY: P. HENSLEY
DEPUTY CLERK

/s/ Edward B. Lowry
Edward B. Lowry

/s/ Robert W. Jackson
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Counsel for the Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Notice of Appeal was mailed postage fully prepaid on 13th day of July, 1989 to counsel of record:

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Robert W. Jackson

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

OWEN D. OKSANEN, M.D., Plaintiff	)	CIVIL ACTION NO. 88-0166-H
v.	)	ORDER
PAGE MEMORIAL HOSPITAL, et al., Defendants	)	(Filed June 16, 1989)
	)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED AND ORDERED

that:

1. Defendants' motions for summary judgment shall be, and they hereby are, granted

2. This case shall be, and it hereby is, dismissed with prejudice and stricken from the docket of this court.

The clerk is hereby directed to send a certified copy of this Order, and the accompanying Memorandum Opinion, to all counsel of record.

ENTERED: /s/ James H. Michael, Jr.
Judge

June 16, 1989
Date

A TRUE COPY, TESTE
JOYCE F. WITT, CLERK
BY: /s/ P. Hensley
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

OWEN D. OKSANEN, M.D., Plaintiff	)	CIVIL ACTION NO. 88-0166-H
v.	)	MEMORANDUM OPINION
PAGE MEMORIAL HOSPITAL, et al., Defendants	)	JUDGE JAMES H. MICHAEL, JR.

This matter comes before the court upon motions to dismiss and motions for summary judgment filed by defendants Page Memorial Hospital ("Page Memorial"), J. R. Holsinger, Romulo Ancheta, Fang S. Horng, and James G. Dale. Each of the individual defendants in this action is a physician who practices medicine in Page County, Virginia, and each held Medical Staff privileges at defendant Page Memorial during the period in question. For the reasons stated *infra*, the defendants' motions are granted.

The plaintiff, Owen Oksanen, also a physician and a former member of Page Memorial's Medical Staff, alleges in his amended complaint that the defendants collectively forced him from his practice of medicine in Page County, by combining and conspiring to restrain competition in, and to monopolize, the practice of medicine within Page County in violation of the Sherman Act, 15 U.S.C. §§ 1 and 2, and the Virginia Anti-Trust Act, Va. Code § 59.1-9.1, et seq. The plaintiff also alleges that the defendants conspired to injure him in his reputation, trade,

business, or profession, in violation of Va. Code § 18.2-499, and that the defendants tortiously interfered with the plaintiff's contractual relationships. The plaintiff, a Florida resident, invokes this court's jurisdiction pursuant to 28 U.S.C. §§ 1337 and 1332.

All of the defendants have filed motions to dismiss or motions for summary judgment as to each of the five counts of the amended complaint. Because these motions have been generously supplemented by the parties with numerous affidavits, transcripts of hearings, correspondence, and various other exhibits, the court shall treat the defendants' motions as motions for summary judgment and dispose of them as provided in Rule 56. *See* Fed. R. Civ. P. 12(b). The court has given all parties in this matter reasonable opportunity to present all material pertinent to such a motion for summary judgment pursuant to Rule 56. *Id.* These motions have been thoroughly briefed and argued and are now ripe for disposition by this court.

I.

Because this court must carefully evaluate the evidence presented by the parties in order to determine if it indeed provides a genuine issue for trial in regard to any of the five counts of the amended complaint, and because the Supreme Court has previously indicated that summary judgment should be used "sparingly" in complex antitrust litigation, *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962),[1] the court believes it is

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[1] This court notes that the force of the *Poller* dicta has been somewhat diluted in light of the recent willingness of federal

(Continued on following page)

appropriate to provide a detailed recitation of the lengthy factual and evidentiary basis of this action. In its consideration of these motions for summary judgment, the court will accept the facts alleged by the plaintiff as true and will view these facts in the light most favorable to the plaintiff. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

A.

After finishing his three year residency at the University of Virginia Hospital in 1978, the plaintiff, Owen Oksanen, immediately moved to Page County in order to practice medicine in Luray, Virginia. When he arrived in Luray, Dr. Oksanen states that he was offered a position in Dr. Holsinger's office, which he turned down in order to open his own office as an individual practitioner. After a probationary period of one year, Dr. Oksanen was given full Medical Staff privileges at Page Memorial, the only hospital in Page County. Page County has a population of approximately 18,000. Page Memorial is a small community hospital whose entire Medical Staff did not exceed five or six physicians, including the plaintiff, during the period relevant to this action.

Each of the individual defendants were members of Page Memorial's Medical Staff during Dr. Oksanen's

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courts to impose summary judgment in antitrust litigation when non-moving parties failed to produce evidence sufficient to support their allegations of Sherman Act violations. See *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 101 (4th Cir. 1987); *Cooper v. Forsyth County Hosp. Auth., Inc.*, 789 F.2d 278, 282 (4th Cir. 1986).

tenure at the hospital. Defendant Holsinger, a former chief of the Medical Staff at Page Memorial, is a general practitioner who served on the hospital's Board of Trustees from 1972 to 1983. Defendant Ancheta, a surgeon, was Chief of Staff at Page Memorial from 1976 to 1984. Defendant Horng, also a surgeon, succeeded Dr. Ancheta as Chief of Staff in 1984. Defendant Dale began his practice in Luray in August 1983, acting primarily as a noninvasive cardiologist and an internist.

Page Memorial's administration began to receive complaints regarding Dr. Oksanen's behavior in 1979, soon after he arrived at the hospital.[2] Unfortunately, relations between Dr. Oksanen and the hospital staff did not improve over time and, instead, worsened as his tenure at the hospital continued.[3]

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[2] In an October 31, 1979, letter to Dr. Oksanen, John S. Berry, Administrator of Page Memorial, writes that Dr. Oksanen's "attitude and comments concerning the use of laboratory services and personnel disturb [him] greatly." Exhibit 20, Page Memorial Memorandum in Reply.

[3] Exhibit 20 of the Plaintiff's Memorandum in Opposition provides a lengthy list of Dr. Oksanen's perceived abusive and confrontational behavior toward Page Memorial's nurses, staff members, administrators, physicians, and visitors from 1979 to 1983, behavior which often occurred in full view of the hospital's patients. Dr. Oksanen provides his explanation for these incidents in Exhibit 21, Plaintiff's Memorandum in Opposition, and Exhibit 1, pp. 229-246, Plaintiff's Memorandum in Opposition. When viewed together, these exhibits suggest that a long history of relatively minor incidents involving Dr. Oksanen had created considerable tension between Dr. Oksanen and the hospital staff long before the commencement of the 1983 disciplinary proceeding against Dr. Oksanen.

Dr. Oksanen states that, as time passed, he became increasingly concerned over the quality of care his patients received at Page Memorial. Oksanen Affidavit at 2. As a result, he referred many of his patients to other hospitals which he felt provided "a better quality of specialized medical service" for his patients; many of these referrals were to the University of Virginia Hospital. *Id.* Dr. Oksanen claims that the principal problem with Page Memorial's medical care was Dr. Horng and Dr. Ancheta's failure to recognize the limitations of their own surgical abilities. *Id.* at 3. Dr. Oksanen also states that in 1983 he discovered that some of his patients were selectively refused admission to the local nursing home. *Id.* at 3-4.

During an April 5, 1983, meeting of the Medical Staff, attended by Drs. Oksanen, Ancheta, Horng, and Holsinger, Dr. Ancheta read a letter from Phyllis Baker, Director of Nursing Services, regarding the nursing staff's increased concern over disagreements between physicians and nurses, disagreements which led to anger, frustration, and ill-feelings among the nursing staff. Exhibit 1, Page Memorial Memorandum in Reply. Nurse Baker's letter was again discussed at the hospital's Board of Trustees' meeting held on April 12, 1983. Dr. Holsinger, a member of the Board, and Dr. Ancheta, then Chief of Staff, attended this meeting. Exhibit 2, Page Memorial Memorandum in Reply.

Unfortunately, problems between the Medical Staff and the nurses continued to grow, and consequently, the Executive Committee of the Board of Trustees convened on May 19, 1983, in order to discuss the problem. None of the defendants attended this meeting. Exhibit 3, Page

Memorial Memorandum in Reply. Members of the Executive Committee discussed the problem with Nurse Baker and then directed J. S. Berry, the hospital's Administrator, to draft a letter to all members of the Medical Staff which would highlight the problem and the Committee's recommendation. *Id.*

On May 21, 1983, Dr. Oksanen, unhappy over the treatment of a patient, told a charge nurse and her supervisor, Dorothy Steward and Nancy Lehman, that they "don't take care of their patients." Exhibits 4, 5, 6, and 7, Page Memorial Memorandum in Reply. The reprimand occurred in the presence of other hospital employees, patients, and visitors. *Id.* When the nurses involved in the incident attempted to confront Dr. Oksanen about the public reprimand, he refused to speak to the charge nurse involved, threw down his charts, and ran from the area. *Id.* For days after this incident, Dr. Oksanen refused to speak with Nurse Stewart, even in regard to the condition of his patients. Exhibits 8 and 9, Page Memorial Memorandum in Reply.

Dr. Oksanen's behavior prompted John Berry, Administrator of the hospital, to request that the Medical Staff investigate the incidents, pursuant to the procedures outlined in the Medical Staff bylaws, and take any necessary corrective action against Dr. Oksanen. Exhibit 11, Page Memorial Memorandum in Reply. The Medical Staff, then consisting of all the individual defendants except Dr. Dale, refused to discipline Dr. Oksanen, despite Berry's request, finding that the incident did not merit disciplinary action. Exhibit 15, Page Memorial Memorandum in Reply. Minor incidents between Dr. Oksanen and hospital employees continued to occur during the first week of

June 1983. Exhibits 12 and 14, Page Memorial Memorandum in Reply.

On June 14, 1983, John Berry returned to the Board of Trustees with a draft of the previously requested letter addressing relations between physicians and nurses. Exhibit 15, Page Memorial Memorandum in Reply. After extensive discussion of the contents of the letter, the Board approved sending the letter to all of the hospital's active physicians by a vote of 5 to 3, with one abstention. *Id.* The letter, mailed on June 20, 1983, over the signature of T. C. Berrey, President of the Board of Trustees, concluded with the hope for "a return to an environment based. on mutual respect and understanding." Exhibit 16, Plaintiff's Memorandum in Opposition.

Even though he understood that Mr. Berrey's letter was sent to all members of the Medical Staff, Exhibit 17, Plaintiff's Memorandum in Opposition, Dr. Oksanen took offense at the letter's contents and requested in a June 24, 1983, letter to Mr. Berrey that he retract the June 20 letter immediately.[4] At the Medical Staff meeting on July 5,

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[4] In his June 24, 1983, letter to Mr. Berrey, Dr. Oksanen states that he found Berrey's letter to be "demeaning, insulting, and certainly anything but professional." Exhibit 17, Plaintiff's Memorandum in Opposition. Dr. Oksanen also stated that he was not "sure that the collection of individuals that make up the hospital Board have sufficient background, training, or what have you to function appropriately reviewing the activities of physicians." *Id.* Dr. Oksanen stated further that he believed that "clearing the air between myself as a physician and any disgruntled nurse would be far more constructive in developing a respectful working relationship than the cloak and dagger trial by innuendo approach perpetrated through

(Continued on following page)

1983, Dr. Oksanen indicated that he would not cooperate with the Board of Trustees in its attempt to improve relations between physicians and nurses until a member of the Board of Trustees came by his office, in person, to retrieve the letter of June 20. Exhibit 18, Plaintiff's Memorandum in Opposition.

On July 18, 1983, Dr. Horng angrily confronted Dr. Oksanen in the hospital hallway after he learned that Dr. Oksanen told Nellie Freeze, one of Dr. Horng's patients, that the medication which Dr. Horng had prescribed for her was harmful and potentially life threatening. Exhibit 1, pp. 232-34, Plaintiff's Memorandum in Opposition; Exhibit 2, pp. [sic] 276, Plaintiff's Memorandum in Opposition. Dr. Oksanen insisted that Dr. Horng had made a dangerous mistake and that he was simply acting in the best interest of Dr. Horng's patient. *Id.* The conversation quickly deteriorated into a public shouting match between the two doctors, *id.*, generating such lasting animosity that the two physicians apparently ceased speaking to each other. Exhibit 43, Page Memorial Memorandum in Reply; Exhibit 2, pp. 335-36, Plaintiff's Memorandum in Opposition.

The Board of Trustees discussed Dr. Oksanen and his June 24 letter at length during its July 12, 1983, meeting. Exhibit 19, Page Memorial Memorandum in Reply. Dr.

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your letter of June 20th." *Id.* Dr. Oksanen closed his letter by strongly suggesting that Berrey retract the letter of June 20, stating that the letter "will be in my office and any member of the Board of Trustees of the hospital administration can come down and pick it up at any time." *Id.*

Holsinger did not attend this meeting. Dr. Ancheta, Chief of the Medical Staff and the only defendant to attend the meeting, stated that problems existed with Dr. Oksanen and that patient care had suffered as a result of these problems. *Id.* Dr. Ancheta further stated his belief that the incidents involving Dr. Oksanen would have long ago been cause for termination at a larger hospital with more staff members, but the Medical Staff had been cautious and conservative in its treatment of Dr. Oksanen due to a fear of possible litigation. *Id.* At the Board meeting, John Berry, Administrator of the hospital, added that while all physicians and hospital staff are involved in situations which may cause hard feelings or problems, Dr. Oksanen had been involved in a disproportionate number of these situations since arriving at Page Memorial. *Id.*

After next discussing the need for maintaining appropriate documentation and following procedural formalities, the Board of Trustees unanimously voted to request that the Medical Staff take corrective action against Dr. Oksanen, pursuant to Article VII, § 2 of the Medical Staff Bylaws. Exhibit 11, Page Memorial Memorandum in Reply. In light of the Medical Staff's earlier reluctance to act against Dr. Oksanen, the Board stated that if action was not taken against Dr. Oksanen, it would be forced to scrutinize Dr. Oksanen's hospital privileges more thoroughly during the annual credentialling process. *Id.*

B.

The Executive Committee of the Medical Staff subsequently met on August 4, 5, and 11, 1983, in order to

consider the Board's request for corrective action against Dr. Oksanen. Exhibits 8-15, Page Memorial Memorandum in Support. At the August 11, 1983, meeting, Dr. Horng moved to revoke Dr. Oksanen's privileges as a member of the Medical Staff at Page Memorial; Dr. Holsinger seconded the motion, which carried by a vote of 3 to 1 with Dr. Oksanen casting the only opposing vote. Exhibit 13, Page Memorial Memorandum in Support at 5. Dr. Oksanen noted his appeal from the Executive Committee's decision on August 22, 1983. Exhibit 16, Page Memorial Memorandum in Support.

The Joint Conference Committee of Page Memorial met on September 14 and September 20, 1983, pursuant to Article V § 2(e) of the Medical Staff Bylaws, to review the Executive Committee's decision to revoke Dr. Oksanen's staff privileges. The committee heard testimony from 19 witnesses, including Dr. Oksanen, regarding the plaintiff's behavior. Dr. Ancheta was the only defendant to offer testimony. Exhibits 1 and 2, Plaintiff's Memorandum in Opposition. Some of the witnesses listed specific examples of Dr. Oksanen's divisive behavior and offered their opinions on the corrosive effect of this behavior on hospital morale.[5] Other witnesses provided testimony more

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[5] Phyllis Baker, John Berry, and Ann Crist all described the detrimental effect which Dr. Oksanen's behavior had on morale among hospital employees. See Exhibit 36, Page Memorial Memorandum in Reply. The testimony also provided examples of Dr. Oksanen's divisive behavior, including insults directed toward hospital staff, patients, and visitors. See Exhibits 37-41, Page Memorial Memorandum in Reply.

favorable to Dr. Oksanen, commenting upon his competence and his concern for his patients.

On October 6, 1983, the Executive Committee of the Medical Staff, after reviewing the proceedings before the Joint Conference Committee, voted to recommend to the Joint Committee that Dr. Oksanen's staff privileges be revoked. Defendants Holsinger, Horng, and Ancheta attended the meeting, as did the plaintiff. Exhibit 22, Page Memorial Memorandum in Support. The Joint Conference Committee, after further consideration, then recommended that the Board of Trustees suspend Dr. Oksanen's staff privileges. Dr. Ancheta was the only defendant serving on the Joint Conference Committee at that time. Exhibit 23, Page Memorial Memorandum in Support. Finally, after holding a special meeting where both Dr. Oksanen and his counsel argued against suspension of staff privileges, the Board of Trustees voted 9-2 to suspend Dr. Oksanen's privileges through December 31, 1983, to be followed by a one year probationary period. Exhibit 30, Page Memorial Memorandum in Support. Dr. Holsinger, the only defendant on the Board of Trustees, abstained from voting. *Id.*

Dr. Oksanen's probation carried several conditions, including his attendance at bi-weekly, *ad hoc* meetings with the Chief of Staff, the hospital administrator, and two members of the Board of Trustees. *Id.* The Board also stated that members of the Medical Staff and hospital employees would be expected to cooperate with Dr. Oksanen and assist him in solving any problems or conflicts which might arise during the probationary period. *Id.*

C.

The series of actions taken against Dr. Oksanen aroused controversy in the community and generated widespread publicity. *See generally* Exhibit 24, Plaintiff's Memorandum in Opposition. Local newspapers published numerous letters in support of Dr. Oksanen which praised his devotion to his patients and his medical competence. *Id.* at 6. A group of Dr. Oksanen's patients joined together in the late summer to form a committee called the Concerned Citizens, to oppose the pending disciplinary action against Dr. Oksanen. *Id.* at 7. This committee circulated petitions in support of Dr. Oksanen, gathering well over 1000 signatures. *Id.*

Dr. Oksanen himself held a press conference in his Luray office a few days after the news of his suspension was made public. *Id.* at 17. Newspaper accounts of the press conference indicated that Dr. Oksanen called for community support in a legal battle to clear his record, saying that he felt compelled to sue the hospital to ensure his patients' future care as well as to protect his reputation as a family practitioner. *Id.* Dr. Oksanen was also quoted as saying that he stopped referring patients to one of Page Memorial's surgeons in January 1983, after the second of three "surgical disasters" occurred at the hospital. When later asked if Dr. Horng was the surgeon involved in these disasters, Dr. Oksanen was quoted as saying, "you can assume that's whom I'm referring to." *Id.* Dr. Oksanen was also quoted as saying that Dr. Holsinger, whom he described as the "controlling force" in Luray's Montvue nursing home, was "restraining him from admitting his patients to the home." *Id.*

In the wake of Dr. Oksanen's suspension, the Concerned Citizens mounted a campaign to elect several of its members to Page Memorial's Board of Trustees, and in November, 1983, four members of the committee were elected to the Board, ousting Dr. Holsinger in the process. *Id.* at 18.

Soon after he returned to Page Memorial's Medical Staff in 1 January, 1984, Dr. Oksanen wrote a letter to other members of the Medical Staff, stating that he was available for emergency room call, wished to make himself available for cross coverage, and would be happy to assist other physicians in the care of their patients if the need arose. Exhibit 5, Plaintiff's Memorandum in Opposition. Dr. Horng responded to Dr. Oksanen's letter with an angry, vitriolic letter of his own, stating that their professional relationship could not improve until Dr. Oksanen publicly retracted and apologized for his statements regarding Dr. Horng's medical incompetence. Exhibit 6, Plaintiff's Memorandum in Opposition.

Dr. Oksanen and David Hammond, a newly-elected member of the Board of Trustees, then visited each member of the Medical Staff personally in an attempt to seek their cooperation in Dr. Oksanen's return to the Medical Staff. Oksanen Affidavit at 9. During these visits, Dr. Oksanen states that Dr. Horng demanded that he leave his office, and Dr. Holsinger expressed pessimism regarding the possibility of future cooperation. *Id.*

Relations between Dr. Oksanen and the other physicians on the Medical Staff steadily worsened during the probationary period. On January 19, 1984, a special meeting of the Medical Staff was held in order to discuss

emergency room coverage for Dr. Oksanen's patients; the meeting was attended by Dr. Oksanen, all of the defendants, two members of the Board of Trustees, and Mr. Berry, the hospital administrator. Exhibit 7, Plaintiff's Memorandum in Opposition. When Dr. Oksanen complained to the staff doctors that he had been forced to transfer one of his patients from Page Memorial because of their refusal to cover for him, the doctors indicated that the lack of coverage resulted from Dr. Oksanen's failure to ask for coverage more than two days in advance. *Id.* Dr. Oksanen also expressed concern that the members of the Medical Staff were not complying with the Board's mandate of professional cooperation during his probationary period. In response, the other doctors indicated to Dr. Oksanen that his public remarks had not only undermined their relationship with him, but had also seriously damaged any potential doctor/patient relationship with Dr. Oksanen's patients, making their coverage for Dr. Oksanen's patients problematic. *Id.* When the Medical Staff suggested that Dr. Oksanen retract his public statements about the poor quality of patient care at Page Memorial, Dr. Oksanen refused, saying he was misquoted, and instead indicated that he too was owed an apology. *Id.*

Tension continued through the spring of 1984. While on probation, Dr. Oksanen was not named to serve on committees promulgated by the Medical Staff. Oksanen Affidavit at 10. On-call coverage remained a problem. Members of the Medical Staff, with the exception of Dr. Dale, often declined to cover for Dr. Oksanen, and Dr. Oksanen, on occasion, failed to secure any coverage during his absences from the hospital. Exhibit 35, Page

Memorial Memorandum in Support; Exhibits 45-49, Page Memorial Memorandum in Reply; Exhibit 8, Plaintiff's Memorandum in Opposition. The bi-weekly committee meetings failed to improve relations between Dr. Oksanen and the other physicians. Exhibit 44, Page Memorial Memorandum in Reply. Complaints about Dr. Oksanen's behavior once again began to accumulate. Exhibit 35, Page Memorial Memorandum in Support; Exhibits 50-56, Page Memorial Memorandum in Reply.

On May 8, 1984, the Board of Trustees again voted to request the Medical Staff to take corrective action against Dr. Oksanen, triggering the same set of disciplinary procedures which had taken place the previous year. Exhibits 33, Page Memorial Memorandum in Support. Dr. Horng, the acting Chief of Staff, was the only defendant in attendance at this Board meeting. *Id.* On June 14, 1984, the Joint Conference Committee held a hearing to consider the latest series of complaints regarding Dr. Oksanen's behavior.[6] Exhibit 47, Page Memorial Memorandum in Support. The Executive Committee of the Medical Staff then met on June 22, 1984, and, after reviewing the evidence presented to the Joint Conference Committee, voted to recommend to the Board of Trustees that Dr. Oksanen's staff privileges be revoked, without the possibility of future reappointment. Exhibit 48, Page Memorial

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[6] Dr. Oksanen attended the meeting only to read a brief statement, in which he complained of the unfairness of the complaints made against him as well as the process by which his behavior was being evaluated. Exhibit 47, pp. 4-14, Page Memorial Memorandum in Support. Dr. Oksanen then left the meeting, stating that he had to make a court appearance in relation to his impending divorce. *Id.* at 13.

Memorandum in Support. The meeting was attended by defendants Horng, Holsinger, and Dale. *Id.* Dr. Oksanen resigned from the Medical Staff on June 27, 1984, exhibit 50, Page Memorial Memorandum in Support, making moot the corrective action procedure then in effect against him. Exhibits 51, Page Memorial Memorandum in Support.

II.

In Count I of his amended complaint, the plaintiff alleges that Page Memorial and the individual physicians who served on the hospital's Medical Staff violated § 1 of the Sherman Act, which makes unlawful any "contract, combination . . . or conspiracy, in restraint of trade." 15 U.S.C. § 1.

Rule 56 requires a party seeking summary judgment to bear the initial responsibility of informing the district court of the basis for its motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This burden may be satisfied by "pointing out to the district court that there is an absence of evidence to support the non-moving parties' case." *Goldberg v. B. Green and Co., Inc.*, 836 F.2d 845, 847 (4th Cir. 1988), *citing Celotex*, 477 U.S. at 325.

Rule 56(e) states further that the nonmoving party must then go beyond mere allegations or denials of its pleadings, and, by its own affidavits, or by depositions, answers to interrogatories, and admissions on file, designate "specific facts showing that there is a genuine issue for trial." 477 U.S. at 324. Although the offered evidence must of course be viewed in the light most favorable to the non-moving party, *see e.g., United States v. Diebold,*

Inc., 369 U.S. 654, 655 (1962), the evidence must still provide a genuine issue for trial; that is, the evidence must "be such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Supreme Court has cautioned that the language of Rule 56

> mandates the entry of summary judgment after adequate time for discovery . . . against a party who fails . . . to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact."

Celotex, 477 U.S. at 322-23.

To survive a motion for summary judgment in a cause of action maintained pursuant to § 1 of the Sherman Act, a plaintiff must establish that there is a genuine issue of material fact as to whether the defendants entered into an illegal conspiracy that caused the plaintiff to suffer a cognizable injury. *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). The crux of a § 1 claim is therefore the element of concerted action. *Terry's Floor Fashions, Inc. v. Burlington Indus., Inc.*, 763 F.2d 604, 610 (4th Cir. 1985). The plaintiff must produce "direct or circumstantial evidence which reasonably tends to prove . . . a conscious commitment to a common scheme designed to achieve an unlawful objective;" in addition, the evidence produced should "tend to exclude the possibility of independent action."[7] *Cooper v. Forsyth*

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[7] The Fourth Circuit has applied this standard for summary judgment in "dealer termination" cases as well as in

(Continued on following page)

County Hosp. Auth., Inc., 789 F.2d 278, 281 (4th Cir. 1986) (citations omitted).

Although discovery in this action has not been concluded, and has been held in abeyance since this court's order of November 10, 1988, the material submitted to the court by the defendants and by the plaintiff is both voluminous and comprehensive. The court thus finds that the discovery already undertaken is certainly adequate for the disposition of these motions for summary judgment. *Celotex*, 477 U.S. at 322.

A.

As evidence of the existence of an anticompetitive conspiracy among the defendants, Dr. Oksanen first argues that the individual defendants' involvement in the 1983 and 1984 disciplinary actions is itself proof of concerted action among the defendants. The court finds that these events, of themselves, do not reasonably indicate the type of anticompetitive, concerted activity among the individual defendants which the plaintiff must produce in order to survive the defendants' motions for summary judgment.

The court first notes that both the 1983 and 1984 disciplinary actions were initiated, and ultimately conducted, by Page Memorial's Board of Trustees, not by the individual defendants who comprised the hospital's

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(Continued from previous page)

"group boycott" cases, such as the instant action. *Cooper v. Forsyth County Hosp. Auth., Inc.*, 789 F.2d 278, 281 no. 11 (4th Cir. 1986)

Medical Staff. Moreover, the medical staff's 1983 vote to recommend that the Board of Trustees revoke Dr. Oksanen's staff privileges occurred only a few months after the Medical Staff declined to recommend any corrective action against Dr. Oksanen in regard to his treatment of hospital nurses. The evidence shows that this change of attitude toward Dr. Oksanen is grounded on his behavior in the late spring and early summer of 1983, in the face of Dr. Oksanen's conclusory argument that the basis of the change of attitude was the threat he posed to the individual defendants' alleged dominance of the county's medical services market. The evidence clearly shows that this behavior by Dr. Oksanen finally prompted the members of the Medical Staff to recommend that the plaintiff be disciplined.

The plaintiff has presented no evidence to indicate that the individual defendants acted in concert to control or influence the actual disciplinary machinery of the Board of Trustees.[8] The fact that the individual defendants met together in 1983 and 1984, at the request of the Board of Trustees and pursuant to the Medical Staff's Bylaws,[9] in order to discuss complaints regarding Dr. Oksanen, coupled with the fact that the individual defendants then decided to recommend disciplinary action

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[8] Dr. Holsinger, the only defendant serving on the Board of Trustees at the time of the 1983 disciplinary action, abstained from the Board's vote to suspend Dr. Oksanen's staff privileges.

[9] The plaintiff himself attended the October 6, 1983, meeting of the Executive Committee of the Medical Staff when several of the individual defendants voted to revoke his staff privileges.

against Dr. Oksanen, can not of themselves support a reasonable inference of the existence of an anticompetitive conspiracy among the individual defendants. The plaintiff has produced no evidence which tends to exclude the possibility that the individual defendants were simply acting independently in their respective capacities as members of the Medical Staff when they voted to recommend the revocation of Dr. Oksanen's staff privileges in 1983 and 1984.[10] Federal courts have consistently recognized that mere contacts and communications, or the mere opportunity to conspire, among antitrust defendants is insufficient evidence from which to infer an anticompetitive conspiracy in the context of the denial of hospital privileges. *Cooper v. Forsyth County Hosp. Auth., Inc.*, 789 F.2d at 291 (citations omitted).

In contrast, the recurring litany of complaints concerning Dr. Oksanen's allegedly improper behavior provides ample evidence that the individual defendants were not conspiring to restrain trade or to injure Dr. Oksanen in 1983 and 1984 but were instead disciplining a fellow physician who was conceived to be as unprofessional as he was uncooperative. The evidence pertaining

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[10] In his affidavit, Dr. Oksanen states that at a staff meeting in the summer of 1983, Dr. Holsinger looked away in an embarrassed manner when Dr. Horng asked him if he should then start the discussion of the list of complaints about Dr. Oksanen's behavior. Oksanen Affidavit at 8. Dr. Oksanen also states that Dr. Horng told him near the end of 1982 that if he "didn't act nicer to Dr. Holsinger," Dr. Holsinger would get him in "terrible trouble" with his practice. *Id.* The court does not find either of these incidents to be suggestive of any sort of "cabal and conspiracy" against Dr. Oksanen, *id.*, much less the type of conspiracy to restrain trade complained of in Count I.

to the individual defendants' involvement in the 1983 and 1984 disciplinary actions does not, of itself, suggest a commitment to a common scheme among the defendants to restrain trade by undermining Dr. Oksanen's medical practice. The evidence does show clearly that the actions taken against Dr. Oksanen by the Board of Trustees, the Joint Conference Committee, and the Executive Committee of the Medical Staff were in fact predictable responses to the plaintiff's behavior, undertaken in accordance with the regulatory mechanism prescribed in the hospital By-Laws.

B.

The court is also unpersuaded that Dr. Oksanen's 1984 on-call coverage problems, his lack of access to Page Memorial's radiological and laboratory facilities while not a member of the Medical Staff, and his inability to admit certain patients to Montvue Nursing Home, can be construed as evidence of a conspiracy among the individual defendants.

The court accepts plaintiff's statement that some of the individual defendants on occasion refused to provide on call [sic] coverage for his patients. Even so, the plaintiff has produced no evidence which indicates the existence of an agreement or scheme among the individual defendants to refuse to provide Dr. Oksanen with on-call coverage. In fact, Dr. Dale's affidavit indicates that he consistently provided on-call coverage for Dr. Oksanen until June 1984. The evidence also shows that the members of the Medical Staff attempted to resolve the cross-coverage problem at a special meeting on January 19,

1984. No evidence presented by the plaintiff rebuts the explanation that some of the individual defendants, for their own reasons, simply found it increasingly difficult to "do a favor" for Dr. Oksanen as a result of the tension and ill-will generated in the wake of the 1983 corrective action and Dr. Oksanen's subsequent public criticism of the hospital.

The plaintiff's allegation concerning Montvue Nursing Home's selective refusal of admission to some of Dr. Oksanen's patients is similarly deficient in its ability to exclude the possibility of independent action by the individual defendants. The plaintiff's affidavit alleges that Dr. Holsinger had "power" at the nursing home "as a medical doctor and as an owner." Each of the individual defendants, including Dr. Holsinger, has submitted affidavits denying the plaintiff's bare allegation that they somehow influenced Montvue's admissions decisions. In response, Dr. Oksanen's affidavit presents the following evidence: one of his patients developed bed sores and dehydration at the home and another two of his patients were refused admission to the home without first changing doctors. This circumstantial evidence fails to suggest that even one of the individual defendants influenced Montvue's decision to refuse to admit Dr. Oksanen's two patients. More importantly, it absolutely fails to demonstrate any concerted effort among the individual defendants to block the admission of Dr. Oksanen's patients to the nursing home.

Finally, as evidence of concerted activity, Dr. Oksanen offers the fact that he was denied the use of Page Memorial's ancillary facilities during his suspension and after his resignation, even though he was on staff at

another area hospital. Page Memorial responds that Dr. Oksanen never applied for courtesy staff privileges, pursuant to Article IV of the Medical Staff Bylaws, during his suspension or after his resignation from the Medical Staff, and was thus precluded access to Page Memorial. Dr. Oksanen has not alleged that he ever applied for courtesy staff privileges. Once again, the court does not find that this evidence supports the inference of a conspiracy among the individual defendants.

C.

The court has been careful to view the evidence in this action and the inferences drawn from the evidence in the light most favorable to the plaintiff, *United States v. Diebold, Inc.*, 369 U.S. at 655, yet the court can find no evidence which tends to exclude the possibility that the alleged conspirators acted independently or which reasonably tends to prove a conscious commitment among the individual defendants to a common scheme designed to obtain an unlawful objective. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. at 752.

The court recognizes that there is authority to suggest that the Medical Staff of a hospital is itself "a combination of individual doctors and therefore that any action taken by the Medical Staff satisfies the 'contract, combination, or conspiracy' requirement of Section 1 [of the Sherman Act]." *Weiss v. York Hospital*, 745 F.2d 786, 814 (3d Cir. 1984). The court declines to adopt this reasoning, which has been previously questioned by the Fourth Circuit. *Cooper*, 789 F.2d at 281 n. 12. Because the court finds

no evidence which suggests a conspiracy among the individual defendants, the court can likewise find no evidence to indicate that Page Memorial conspired with its Medical Staff in order to force Dr. Oksanen from the practice of medicine. For this reason, the court need not consider the application of the intracorporate immunity doctrine, and its "independent personal stake" exception, to Page Memorial. *Bushci v. Kirvin*, 775 F.2d 1240, 1252 (4th Cir. 1985).

The court finds that the evidence upon which Dr. Oksanen relies to support his claim of a conspiracy among the defendants is insufficient to create a genuine issue such that a reasonable jury could find for the plaintiff. *Anderson v. Liberty Lobby Inc.*, 477 U.S. at 248. The court therefore grants the defendants' motions for summary judgment as to Count I of the complaint.

III.

Count II of the plaintiff's amended complaint alleges that the defendants conspired with each other to aquire [sic] monopoly power over the market for medical services in Page County and did in fact possess monopoly power in this market. Because the court has already found that the plaintiff has failed to proffer evidence of a conspiracy in violation of Section 1 of the Sherman Act sufficient to withstand the defendants' motions for summary judgment, the court accordingly finds the conspiracy claim brought under Section 2 similarly deficient. *Cooper*, 789 F.2d at 280 n. 10. However, the court must still

examine the plaintiff's claim that the defendants possessed actual monopoly power over the county's medical market in violation of Section 2 of the Sherman Act.[11]

In *United States v. Grinnell*, 384 U.S. 563, 570-71 (1966), the Supreme Court provided the following description of monopolization:

> The offense of monopoly under Section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

This court is by no means convinced that the defendants possessed monopoly power but will assume *arguendo* that this was the case and turn to the second element needed to establish monopolization.

In order to satisfy the second element of a Section 2 claim of actual monopolization, the plaintiff must show that the defendants' actions demonstrate the willful acquisition and maintenance of monopoly power. It is of course axiomatic that "no monopolist monopolizes unconscious of what he is doing," *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985). Evidence of monopolistic intent is necessary in order to

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[11] Section 2 of the Sherman Act make [sic] it unlawful to monopolize, to attempt to monopolize, or to conspire to monopolize. 15 U.SC. § 2. *Cooper v. Forsyth County Hosp. Auth., Inc.*, 789 F.2d 278, 280 n. 10 (4th Cir. 1986).

demonstrate that the challenged conduct is truly "predatory" and thus deserving of the application of Section 2 of the Sherman Act. *Id.*

The defendants have submitted strong evidence that the various actions taken against Dr. Oksanen do not suggest the willful maintainence [sic] of monopoly power, but were motivated by professional concerns over the impact of Dr. Oksanen's behavior on hospital morale and, ultimately, on patient care. *See White v. Rockingham Radiologists, Ltd.*, 820 F.2d at 105, *citing Aspen Skiing Co.*, 472 U.S. at 604-05. In response, the plaintiff has rested on his pleadings, setting forth no specific facts upon which a reasonable jury could rely in order to find that the defendants willfully acquired and maintained their assumed monopoly power. Fed. R. Civ. P. 56(e). Consequently, the court must grant the defendants' motions for summary judgment as to Count II. *Anderson v. Liberty Lobby Inc.*, 477 U.S. at 248.

IV.

Having found the plaintiff's federal antitrust claims deficient, the court now turns to the motions for summary judgment on the remaining state law claims, brought under this court's diversity jurisdiction.

A.

In Count III of the amended complaint, the plaintiff alleges that the defendants violated the Virginia Antitrust

Act, Va. Code §§ 59.1-9.1, et seq. In support of this allegation, the plaintiff relies upon the same evidence put forward to support the Sherman Act claims. By its own terms, the Virginia Antitrust Act must "be applied and construed to effectuate its general purposes in harmony with judicial interpretation of comparable federal statutory provisions." Va. Code § 59.1-9.17. Any claims under the Virginia Antitrust Act for conspiracy in restrain [sic] of trade, Va. Code § 59.1-9.5, or for monopolization or conspiracy to monopolize, Va. Code § 59.1-9.6, fail under the same reasoning the court has already applied to the Sherman Act claims, reasoning which also properly applies to the Virginia statute. *Satellite Television v. Continental Cablevision*, 714 F.2d 351, 358 n. 13 (4th Cir. 1983). The court thus grants the defendants' motions for summary judgment as to Count III.

B.

Count IV of the amended complaint alleges that the defendants conspired to injure the plaintiff's business in violation of Va. Code § 18.2-500, the civil statutory provision analogous to the criminal statute set out at Va. Code § 18.2-499. In order to maintain an action pursuant to Va. Code § 18.2-499-500, the plaintiff must demonstrate that two or more persons combined for the purpose of willfully and maliciously injuring his business, resulting in damage to the plaintiff. *Allen Realty Corp. v. Holbert*, 227 Va. 441, 449, 318 S.E.2d 592, 596 (1984).

The court has already devoted considerable attention to the presentation and analysis of the evidence put before it by the plaintiff and by the various defendants,

and has viewed this evidence in the light most favorable to the plaintiff. In doing so, the court has found that the defendants, in support of their motions for summary judgment, have produced extensive evidence showing that no conspiracy to injure Dr. Oksanen existed among the defendants and that any actions taken against Dr. Oksanen were individual responses to Dr. Oksanen's behavior. In response, the plaintiff has relied upon the mere allegations of his pleadings and has not produced evidence sufficient to support a reasonable inference of the existence of a conspiracy among the individual defendants. Because the plaintiff has produced no evidence of conspiracy, an essential element of an action brought pursuant to Va. Code § 18.2-499-500, Count IV of the amended complaint cannot survive the defendants' motions for summary judgment. *Celotex*, 477 U.S. at 322-23.

C.

In Count V of the amended complaint, the plaintiff alleges that the defendants tortiously interfered in his contractual relations with Page Memorial, with Montvue Nursing Home, and with his individual patients.

i.

In considering the charge that the defendants interfered with the plaintiff's contractual relations with Page Memorial, the court first notes that the plaintiff concedes that Page Memorial cannot itself interfere with a contract to which it is a party. However, the plaintiff submits that the *individual* defendants, both in combination with one

another and individually, intentionally interfered with the plaintiff's contractual relations with Page Memorial. The court will assume *arguendo*, but in no way finds, that the plaintiff's Medical Staff privileges gave rise to a valid contract between the plaintiff and Page Memorial that was not terminable at will; the court also assumes *arguendo* that the individual defendants were third-parties, and not principals, to this contract.

The Virginia Supreme Court has held that the requisite elements of a Virginia claim for tortious interference with a contract that is not terminable at will are as follows: (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. *Duggin v. Adams*, 234 Va. 221, ___, 360 S.E.2d 832, 835 (1987). The court now considers the third element listed above, which requires Dr. Oksanen to show that the loss of his Medical Staff privileges was the proximate result of the individual defendants' intentional interference.

The court has already catalogued the evidence put forth by the defendants to show that the suspension of Dr. Oksanen's Medical Staff privileges in 1983 and his resignation from the Medical Staff in 1984 were not proximately caused by the individual defendants' interference but were instead caused by Dr. Oksanen's behavior. To oppose the motions for summary judgment, the plaintiff has produced, and the court has evaluated, evidence relating to individual defendants' participation in the

1983 and 1984 disciplinary proceedings, the plaintiff's on-call coverage problems, the alleged selective admission of the plaintiff's patients to Montvue Nursing Home, and to the plaintiff's inability to use Page Memorial's facilities while not a member of the Medical Staff. Even though the court's prior evaluation of this evidence was undertaken to determine the existence of a conspiracy among all or some of the defendants, the court now finds its prior evidentiary analysis equally applicable to the determination of whether the plaintiff's loss of staff privileges was proximately caused by the individual defendants' intentional interference.

The court has found no evidence which supports a reasonable inference that any of the individual defendants acted in bad faith or with malicious intent toward Dr. Oksanen in the performance of their duties as members of the Medical Staff or its Executive Committee. There is evidence of a considerable row between the plaintiff and Dr. Horng on July 18, 1983, *supra* at 8 and 9, but the plaintiff's recitations themselves show that the controversy was one which produced anger in both doctors, and nothing in that incident can reasonably be said to show bad faith or malicious intent on the part of Dr. Horng. Under the facts which precipitated this angry confrontation, no reasonable inference can be drawn that the incident shows the third element *supra*, i.e., an intentional interference inducing or causing a breach or termination of the relationship or expectancy. Members of the Medical Staff or its Executive Committee are immune from civil liability under Virginia law and, so that evidence of the actions of the individual members cannot be

cited in satisfaction of the causation requirement necessary to maintain a claim for tortious interference with contractual relations.[12]

The court finds the remaining proffered evidence, including the plaintiff's on-call coverage problems, the alleged selective admission of the plaintiff's patients to Montvue Nursing Home, and the plaintiff's inability to use Page Memorial's facilities while not a member of the Medical Staff, insufficient to generate a genuine issue as to whether the proximate cause of the plaintiff's loss of staff privileges was the defendants' intentional interference. The plaintiff's claim that the defendants tortiously interfered in his contractual relationship with Page Memorial cannot survive the defendants' motions for summary judgment.

ii.

Count V of the amended complaint also alleges that the defendants interfered with the plaintiff's contractual

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[12] Va. Code § 8.01-581.16 provides in pertinent part:

> Every member of . . . any committee, board, group, commission or other entity shall be immune from civil liability for any act, decision, omission, or utterance done or made *in performance of his duties* while serving as a member of . . . such committee . . . which functions primarily to review, evaluate, or make recommendations on . . . (v) the competency and qualifications for professional staff privileges . . . provided further that such act, omission, or utterance is *not done or made in bad faith or with malicious intent.*

(emphasis added).

relations with the Montvue Nursing Home. Once again, the court will assume *arguendo* that the plaintiff had a valid contract with the Montvue Nursing Home, entitling him to admit patients to the home. The court makes this assumption in spite of the fact that the plaintiff has offered only a conclusory allegation that he possessed a relationship with the nursing home.[13]

The plaintiff alleges that Dr. Holsinger had "power" at the nursing home as medical doctor and as an owner. Each of the individual defendants has submitted affidavits denying any influence in the nursing home's operations or its admissions decisions. In response, Dr. Oksanen's affidavit indicates that one of his patients developed bed sores and dehydration at the home and that another two of his patients were refused admission to the home without first changing doctors. This evidence fails to show or to imply that any defendants' influence or interference was the proximate cause of Dr. Oksanen's two patients being denied admission to the nursing home.

iii.

Dr. Oksanen's claim that the defendants intentionally interfered with his contractual relationships with his patients is equally meritless. The plaintiff concedes that his contracts with patients are terminable at will. When a

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[13] The plaintiff simply states that he had a "contractual relationship with the nursing home on account of his privileges to admit patients thereto." Plaintiff's Responses to Interrogatories Propounded by Fang S. Horng, plaintiff. 16.

contract is terminable at will, a plaintiff maintaining a tortious interference claim must allege and prove not only an intentional interference causing termination, but also that the defendant used "improper methods" to effect the termination of the business relationship. *Hechler Chevrolet v. General Motors Corp.*, 230 Va. 396, 402, 337 S.E.2d 744, 748 (1985). Because Dr. Oksanen has not offered the name of a single lost patient, this court has difficulty in its consideration of whether the loss of any business expectancy may have been proximately caused by the intentional, improper interference of any of the defendants.

The plaintiff has not proffered evidence to produce a genuine issue as to whether any of the defendants' actions, either individual or collective, were the proximate cause of the plaintiff's loss of contractual relations with Page Memorial, with Montvue Nursing Home, and with his individual patients. The court thus grants the defendants' motions for summary judgment as to Count V of the amended complaint.

V.

The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby*, 477 U.S. at 247-48. Instead, only a *genuine* issue of *material* fact will defeat a proper motion for summary judgment. *Id.* The Court has already explained that a dispute is "genuine" when the evidence is such that a reasonable jury hearing the dispute could return a verdict for the non-moving party. *Id.* at 248. When considering a motion for summary

judgment, the function of a trial judge is "not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249.

The evidence before the court in this matter is insufficient to provide a genuine issue for trial. Moreover, the court does not find that this action has been prematurely rushed to the summary judgment stage without first allowing the plaintiff adequate time to discover evidence indicating genuine issues of material fact. While the court recognizes that full discovery is not yet concluded, the court finds that the plaintiff has had ample opportunity to produce evidence suggesting a genuine issue. The court has examined over 35 exhibits submitted by the plaintiff, including more than 790 pages of transcript testimony from the Joint Conference Committee hearings.[14] Exhibits 1-3, Plaintiff's Memorandum in Opposition.

The court is satisfied with the breadth of the evidence before it and declines to order a continuance pursuant to Rule 56(f) in order to allow depositions to be taken or further discovery to be had.[15] *Celotex*, 477 U.S. at 326.

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[14] The transcripts include extensive testimony by the plaintiff and by each of the individual defendants.

[15] Rule 56(f) provides as follows:

> (f) *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits

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The court will enter summary judgment for all the defendants on all counts and dismiss this action with prejudice. An appropriate Order shall this day issue.

ENTERED: /s/ James H. Michael, Jr.
Judge

June 16, 1989
Date

A TRUE COPY, TESTE

JOYCE F. WITT, CLERK

BY: /s/ P. Hensley
DEPUTY CLERK

(Continued from previous page)

to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Supreme Court, U.S.
FILED
JAN 6 1992
OFFICE OF THE CLERK

(2)

No. 91-951

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

OWEN D. OKSANEN, M.D.,

Petitioner,

v.

PAGE MEMORIAL HOSPITAL; J.R. HOLSINGER, M.D.; FANG S. HORNG, M.D.; JAMES G. DALE, D.O.; ROMULO ANCHETA, M.D.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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QUESTIONS PRESENTED

1. Are a hospital and the members of its medical staff to whom decisions affecting staff privileges are delegated in the first instance capable as a matter of law of contracting, combining or conspiring in restraint of trade in violation of the Sherman Act, 15 U.S.C. § 1, during the peer review process?

2. Was summary judgment properly granted prior to the conclusion of discovery where the evidence, including plaintiff's evidence, demonstrated a legitimate basis for corrective action, independent action by the members of the medical staff, and a lack of any adverse impact on competition?

Rule 29.1 List

Respondent Page Memorial Hospital, a non-profit corporation, has no parent or subsidiary companies to list pursuant to Rule 29.1.

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OWEN D. OKSANEN, M.D.,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

The respondents, Page Memorial Hospital, J. R. Holsinger, M.D., Fang S. Horng, M.D., James G. Dale, D.O. and Romulo Ancheta, M.D., respectfully request that this Court deny the petition for writ of

certiorari, seeking review of the Fourth Circuit's opinion in this case. That opinion is reported at 945 F.2d 696 (4th Cir. 1991) (*en banc*).

STATEMENT OF THE CASE

The petitioner Dr. Owen Oksanen sued the respondents, Page Memorial Hospital and all of the members of its medical staff, alleging that actions taken by the hospital and its staff during the course of peer review violated the provisions of the Sherman Act, 15 U.S.C. § 1 *et seq.*, and alleging a number of pendent state claims.* The district court

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* The Statement of the Case contained in the petition for certiorari incorrectly states that all of the respondent doctors practiced in Luray, Virginia and were

granted summary judgment in favor of the respondents. On rehearing *en banc*, the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the district court.

Page Memorial Hospital, a non-profit corporation, has an organizational structure which includes three agents as required by state law. Va. Dep't. of Health, Rules and Regulations for the Licensure of Hospitals in Virginia,

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on staff at Page Memorial Hospital at all times relevant to Dr. Oksanen's claims. Dr. Dale did not begin practicing at Page Memorial Hospital until August, 1983, however, and took no part in the proceedings leading to Dr. Oksanen's suspension. Pet. App. 18. The petition also asserts that when Dr. Oksanen first arrived in Luray he was invited to join Dr. Holsinger's practice. This assertion was refuted by Dr. Holsinger by affidavit in the district court.

§§ 102, 103 and 105 (May 1, 1982). The Board of Trustees serves as the governing body. The hospital administrator has responsibility for the day-to-day management of the hospital including responsibility for the hospital staff (nursing, laboratory, pharmacy and other hospital-based services) and for the hospital's relations with the medical staff. The medical staff has responsibility for recommendations regarding medical staffing, peer review, quality assurance and utilization review. Pet. App. 4-5.

Through its by-laws the hospital has delegated authority in the first instance to its medical staff to make recommendations concerning any action to be taken with respect to a

physician's staff privileges. Pet. App. 4-5, 15-16. The Board of Trustees, however, retains final authority over peer review decisions. Pet. App. 4, 15-16.

Complaints concerning Dr. Oksanen's conduct began in 1979 almost immediately after he was granted staff privileges at Page Memorial Hospital and mounted over time despite numerous attempts by the hospital administration to resolve these problems with Dr. Oksanen. Pet. App. 5. The complaints about Dr. Oksanen involved volatile public outbursts, profanity and abusive treatment directed toward hospital employees (including nursing and laboratory personnel), patients and their families, professional

reviewers, the hospital administrator, and members of the medical staff; failure to follow established hospital procedures; failure to provide emergency room coverage; and a refusal to cooperate, and on some occasions even to communicate, with the nursing staff, the hospital administrator and the Board of Trustees when problems arose. Pet. App. 5, 6, 7, 8-9.

As a result of continuing problems between Dr. Oksanen and the nursing staff, in May of 1983 the hospital administrator requested that the medical staff take corrective action against Dr. Oksanen. The medical staff declined to take any disciplinary action against Dr. Oksanen. Pet. App. 6.

In June of 1983, the Board of Trustees sent a letter to all physicians on staff requesting that each do his part in maintaining a harmonious work environment at the hospital. In response, Dr. Oksanen told the Board that he found the letter demeaning and insulting and that he would not cooperate with the hospital unless the Board retracted the letter and dispatched a Board member to personally retrieve it from his office. Pet. App. 6.

The Board of Trustees discussed Dr. Oksanen's response at its July, 1983 meeting and voted unanimously to request that the medical staff take corrective action against Dr. Oksanen. Aware of the medical staff's earlier refusal to discipline

Dr. Oksanen, the Board warned that if action was not taken, it would be forced to evaluate his hospital privileges much more thoroughly during the annual credentialing process. Pet. App. 6-7.

The medical staff responded by voting to revoke Dr. Oksanen's privileges. Dr. Oksanen appealed this decision to a joint conference committee comprised of one member of the medical staff and two members of the Board. This committee heard testimony from sixteen witnesses, including Dr. Oksanen. A number of witnesses testified to the negative impact of Dr. Oksanen's disruptive behavior on hospital staff morale and relations. The committee recommended to the Board that at a minimum Dr.

Oksanen's privileges be suspended. Pet. App. 7. In October of 1983, the Board of Trustees, having heard from Dr. Oksanen and his attorney, suspended his privileges for two months to be followed by a one-year probationary period. Pet. App. 7-8.

Subsequently, further complaints were made concerning Dr. Oksanen's disruptive behavior and his failure to follow established hospital procedures. In May of 1984, the Board of Trustees again requested that the medical staff take correction action against Dr. Oksanen. The staff voted to permanently revoke his privileges. Dr. Oksanen resigned from the medical staff in June of 1984, however,

before the Board made a final decision. Pet. App. 8-9.

REASONS WHY THE PETITION SHOULD BE DENIED

A grant of certiorari is not warranted on the first Question Presented in this case because the Fourth Circuit's decision accords with this Court's ruling in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Nor does the second Question Presented warrant a grant of certiorari, because its resolution turns upon the particular facts of the case and because the Fourth Circuit correctly applied the summary judgment standard for antitrust litigation articulated by this Court in *Matsushita Electric*

Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

I. THE FOURTH CIRCUIT PROPERLY APPLIED THE *COPPERWELD* INTRA-CORPORATE IMMUNITY DOCTRINE IN DETERMINING THAT THE HOSPITAL AND ITS MEDICAL STAFF LACKED THE CAPACITY TO CONSPIRE DURING THE PEER REVIEW PROCESS.

The first Question Presented in the petition misstates the holding of the Fourth Circuit in this case. The Fourth Circuit did not hold that a hospital and its medical staff as a matter of law can never conspire within the meaning of § 1 of the Sherman Act. Rather, the court held that the hospital and its medical staff lacked the capacity to conspire during the peer review process because the staff was acting as the

agent of the hospital. Pet. App. 11, 19. This Court recently denied certiorari on this same issue in *Nurse Midwifery Associates v. Hendersonville Community Hospital*, 112 S. Ct. 406 (Nov. 4, 1991).

Furthermore, the petition incorrectly states that the Ninth Circuit's decision in *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440 (9th Cir. 1988), conflicts with that of the Fourth Circuit in the instant case. The Ninth Circuit's holding dealt with a conspiracy between a hospital and a group of doctors outside the peer review process, while the Fourth Circuit's holding specifically deals with the capacity to conspire during peer review when the medical staff is

acting pursuant to a delegation of authority by the hospital.

In *Oltz*, a group of anesthesiologists attempted to coerce the hospital to terminate its contract with a nurse anesthetist and enter into an exclusive contract with them by threatening to leave if the hospital did not accommodate their demands. 861 F.2d at 1443-44. The anesthesiologists acted wholly outside the peer review process. As a matter of fact, the medical staff had recommended that the hospital continue its relationship with the nurse anesthetist. *Id.* In determining that the hospital and the anesthesiologists could conspire, the *Oltz* court stated that the "anesthesiologists were not empowered

to act for St. Peter's" and "[t]herefore...were not acting like an officer in relation to the corporation." *Id.* at 1450.

As the Fourth Circuit emphasized in distinguishing *Oltz*, the "critical element of delegated authority...was absent." Pet. App. 15. In contrast, the medical staff in the instant case was acting pursuant to authority delegated to it by Page Memorial Hospital in making recommendations regarding the status of Dr. Oksanen's staff privileges. The Fourth Circuit likened the hospital's delegation in the first instance of peer review decision-making to its medical staff to a corporation's delegation of authority to its officers. Such delegation of authority falls within

the parameters of the intracorporate immunity doctrine announced by this Court in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

The medical staff acts as the agent of the hospital's Board of Trustees to implement a single, unitary firm policy of evaluating the conduct of those to whom the hospital has extended staff privileges. Pet. App. 13. The Fourth Circuit noted that this delegation of authority does not represent a sudden joining together of independent economic forces which might cause concern under the antitrust laws, because the hospital and its medical staff are not competitors. Rather, the medical staff is a natural component of the

hospital's management structure. Pet. App. 13-14. The Fourth Circuit followed this Court's admonition in *Copperweld*, 467 U.S. at 771, that a corporation's delegation of responsibility to an autonomous unit should not be penalized because the effect would be to discourage the creation of divisions with their inherent benefits. Pet. App. 14. *Accord Nurse Midwifery Assocs. v. Hibbett*, 918 F.2d 605 (6th Cir. 1990), *cert. denied*, 112 S. Ct. 406 (1991); *Nanavati v. Burdette Tomlin Memorial Hosp.*, 857 F.2d 96 (3d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989).

The only circuit court to reach a contrary conclusion on this issue, *Bolt v. Halifax Hosp. Med. Ctr.*, 891

F.2d 810, 819 (11th Cir.), *cert. denied*, 110 S. Ct. 1960 (1990), ignored the functional approach to the intracorporate immunity doctrine mandated in *Copperweld*. Pet. App. 12-13. In fact, the *Bolt* court failed to analyze, or to even cite, this Court's decision in *Copperweld* in ruling on the intracorporate immunity issue. Instead, it simply stated that a hospital and the members of its medical staff are legally separate entities. 891 F.2d at 819. In *Copperweld*, this Court, cautioning against exalting form over substance, 467 U.S. at 763, 772, held that a corporation and its separately incorporated subsidiary are entitled to immunity despite the fact that they are legally separate entities.

The Fourth Circuit observed that in the peer review context the hospital and its medical staff were similar to a parent corporation and its subsidiary with respect to unity of interest and the degree of control which may be exercised. Pet. App. 12, 15-16. These same factors influenced this Court in *Copperweld* to find that the coordinated activities of the two entities should be treated as those of a single enterprise. 467 U.S. at 771-72.

The hospital and its medical staff have a unity of interest in protecting the quality of patient care through peer review. Pet. App. 12. Furthermore, the hospital maintained control over the peer review decision-making process.

While the hospital's Board of Trustees sought advice from the medical staff, the Board could modify the staff's recommendations at any time and retained ultimate responsibility for peer review decisions. Pet. App. 15-16. In fact, the Board of Trustees of Page Memorial Hospital, after first requesting that the medical staff take corrective action against Dr. Oksanen, modified the medical staff's recommendation of revocation of privileges to a two-month suspension and one-year probationary period. Pet. App. 7-8. Upon the Board of Trustees subsequent request for corrective action during the probationary period, the medical staff recommended revocation of

privileges. Dr. Oksanen resigned from the medical staff, however, before the Board of Trustees made a final decision. Pet. App. 9.

The assertion in the petition that a hospital "does not require the assistance of the members of its medical staff in order to operate as a going concern," Pet. 21-22, is incorrect. It not only ignores the practical necessities of efficient hospital management, but also ignores the requirements of state licensure law and national hospital accreditation standards. *See* Va. Dep't. of Health, Rules and Regulations for the Licensure of Hospitals in Virginia, §§ 102 and 105 (1982); Joint Commission on Accreditation of Healthcare

Organizations, *Accreditation Manual for Hospitals* 1991 (1990).

Because the Fourth Circuit properly applied the intracorporate immunity doctrine articulated by this Court in *Copperweld* where a hospital delegates the initial peer review decision to its medical staff, review by this Court is not warranted.

II. SUMMARY JUDGMENT WAS APPROPRIATE WHERE THE EVIDENCE, INCLUDING PLAINTIFF'S EVIDENCE, DEMONSTRATED A LEGITIMATE BASIS FOR CORRECTIVE ACTION, INDEPENDENT ACTION BY MEMBERS OF THE MEDICAL STAFF AND NO ADVERSE IMPACT ON COMPETITION.

Dr. Oksanen asserts that he was denied adequate discovery prior to entry of summary judgment against him. Although the complaint in this proceeding was filed against the

respondents on June 13, 1988, Dr. Oksanen did not file the discovery requests about which he complains until October 20, 1988. Responses to these requests were not due when the summary judgment hearing was conducted on November 7, 1988, at which time the district court stayed any further discovery. Dr. Oksanen had been apprised of the date of the hearing since September 8 when the district court established the briefing schedule and set November 7 as the date for oral argument on the motions.

In opposition to the outstanding motions for summary judgment, Dr. Oksanen submitted thirty-five exhibits, including 690 pages of transcripts from joint conference

committee meetings. Pet. App. 24. This evidence established that the hospital administrator and the Board of Trustees of Page Memorial Hospital, not the medical staff, initiated the actions taken against Dr. Oksanen. *Id.* Furthermore, when first requested by the hospital administrator to take corrective action against Dr. Oksanen, the medical staff refused to do so. Pet. App. 6, 24. As the Fourth Circuit noted, this fact belies Dr. Oksanen's theory of a conspiracy among the members of the medical staff. Pet. App. 24.

Dr. Oksanen's boycott claims challenge actions taken by the hospital because of his failure to comply with hospital regulations and

individual choices made by medical staff members. Pet. App. 22-23. The fact that the hospital initiated the peer review proceedings and maintained control over them precluded any inference that individual members of the medical staff had conspired against Dr. Oksanen to deny him privileges. Pet. App. 23. Furthermore, the medical staff lacked the power to implement any such conspiracy. Pet. App. 19, 20.

Numerous attempts were made by the respondents to deal with complaints about Dr. Oksanen prior to taking formal disciplinary action and the procedures utilized during the peer review process were fair. Pet. App. 21. The evidence submitted to

the district court established that Dr. Oksanen was eventually disciplined as a result of a "litany of complaints from various sources" and that the actions taken by the hospital and the doctors on the medical staff were justified. Pet. App. 22. As the Fourth Circuit stated, "additional discovery would not diminish the fact that the complaints lodged against Oksanen provided a legitimate basis for the corrective actions taken against him." Pet. App. 24.

The Fourth Circuit properly held that Dr. Oksanen received adequate discovery on the key issues in this staff privileges suit, Pet. App. 24, and that he simply failed to meet his summary judgment burden of

establishing that "the inference of conspiracy is reasonable in light of the competing inferences of independent action." Pet. App. 25 (quoting *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)).

Furthermore, summary judgment was appropriate because there was no evidence of any adverse impact on competition. Pet. App. 28. Indeed, the uncontroverted evidence was that seven additional doctors (more than twice the number on staff when the hospital first sought corrective action against Dr. Oksanen) began practicing at Page Memorial Hospital during and shortly after the time period in which Dr. Oksanen was the subject of the disciplinary actions

about which he complains in this proceeding. Pet. App. 27.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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